





(37,512)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 815

MISSOURI STATE LIFE INSURANCE COMPANY AND HARTFORD ACCIDENT & INDEMNITY COMPANY, PETITIONERS,

vs.

MARION JOHNSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

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IN THE

Supreme Court of the United States

MISSOURI STATE LIFE INSURANCE COMPANY

AND

HARTFORD ACCIDENT & INDEMNITY COMPANY, *Petitioners,*

v.

MARION JOHNSON, *Respondent.*

TRANSCRIPT OF RECORD FROM THE SUPREME COURT OF ARKANSAS

STIPULATION

It is stipulated that the clerk of this court, in preparing the transcript of the record to be filed in the Supreme Court of the United States, in connection with appellant's petition for writ of certiorari, may eliminate the testimony of the witnesses which was taken at the trial in the lower court. Review is sought in the Supreme Court of the United States upon the ground that this case should have been removed to the Federal court, and the testimony of the witnesses has no bearing upon that question.

It is expressly agreed and understood between the parties hereto, and their counsel, that, in executing this stipulation, the appellee, Marion Johnson, does not waive any legal rights he may have, or to which he may be entitled.

Dated this 10th day of January, 1933.

Rose, Hemingway, Cantrell
& Loughborough,
Attorneys for Appellant.

John L. McClellan and
Sam T. & Tom Poe,
Attorneys for Appellee.

Filed January 11, 1933.
W. P. Sadler, Clerk.

IN THE HOT SPRING CIRCUIT COURT

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company ..... Defendant.

COMPLAINT

The plaintiff, Marion Johnson, for cause of action against the defendant, Missouri State Life Insurance Company, states: The plaintiff is a citizen and resident of Hot Spring County, Arkansas.

The defendant is, and was at the times hereinafter mentioned, an insurance corporation duly organized and existing under the laws of the State of Missouri for the purpose of insuring persons and, among other things, providing for

them indemnity for total disability by bodily injury or disease, and also for loss of eyesight resulting from bodily injuries effected through external, violent and accidental means independently of all other causes, and is lawfully engaged in such insurance business within the State of Arkansas.

On or about the 4th day of October, 1927, in consideration of the payment by the plaintiff to the defendant of a monthly premium of $1.20, the defendant, by its agents duly authorized thereto, make and delivered its policy of insurance, in writing, G-2377, Certificate No. 1075, and thereby insured the plaintiff, among other things, providing indemnity in the amount of $2,000 for total and permanent disability, caused by bodily injury or disease which wholly disabled and prevented plaintiff from engaging in any gainful occupation, prior to attaining 60 years of age, and which disability has existed for a period of six months.

On or about the 4th day of October, 1927, in consideration of the payment by plaintiff to defendant of a monthly premium of forty cents (40c), the defendant, by its agents, duly authorized thereto, made and delivered to plaintiff, its certificate of accidental death, dismemberment and loss of sight indemnity insurance, No. 1075, in writing, under Group Policy No. ADD-501, issued and delivered by defendant to Missouri Pacific Railroad Company, the employer of plaintiff, and thereby insured plaintiff, among other things, providing indemnity in the amount of $1,000 in the event plaintiff suffered an accidental loss of sight of one eye by external, violent and accidental means, inde-

pendently of all other causes, within ninety (90) days from the date the injury was sustained.

On or about the ..... day of March, 1930, while both of the policies and certificates were in full force, plaintiff suffered an accidental bodily injury by reason of an automobile in which he was a passenger overturning and falling upon him.

As a result of the automobile overturning and falling upon plaintiff the fifth and sixth cervical vertebrae of plaintiff's spine were fractured and his spine was dislocated between the fifth and sixth cervical vertebrae. There has also been a decrease in the size of the anterior portions of the bodies of the fifth and sixth cervical vertebrae and the articulation between the same has been diminished, with a fusion of the joint anteriorly. The body of the sixth cervical vertebrae was crushed and is tilted with the left side higher than the right. Callous has formed on both sides of the fifth and sixth cervical vertebrae. The articulation between the sixth and seventh cervical vertebrae is also narrowed.

There is also a dislocation of the cervical column beginning at the articulation of the fifth and sixth cervical vertebrae. The structures of the cervical column above this site are displaced anteriorly and are out of line.

There is also a tilting of the bodies of the third and fourth thoracic, or dorsal vertebrae, with a narrowing of the articulations in this region.

There is an ankylosis of the cervical column and also of the thoracic, or dorsal, portion of the spine; and there

is also a chronic traumatic hyperthophic arthritis of the cervical and thoracic, or dorsal, portion of the spine, all of which is a result of the injury received by plaintiff when the automobile overturned and fell upon him.

Plaintiff also lost the sight of his right eye as the result of the automobile overturning and falling upon him.

As a result of the injury he received when the automobile overturned and fell upon him, the plaintiff has ever since suffered for mitral insufficiency, hypertension, dyspnoea, and a shock to his entire nervous system, all of which has disabled him and rendered him physically unfit to earn a livelihood since he was injured.

Plaintiff is totally and permanently disabled by reason of said injury and bodily disease.

The defendant has refused to pay plaintiff although plaintiff has duly performed all the conditions of said policies and certificates on his part to be performed.

On or about the ..... day of May, 1930, within the time required for furnishing proof of loss, plaintiff gave to the defendant due notice of his injury and on or about October 23, 1931, gave proof of loss and the duration of his disability and demanded payment of the amount due under the terms of the certificates and policies, which the defendant has refused to pay.

There is now due and owing from the defendant to the plaintiff the sum of three thousand dollars ($3,000), with interest thereon at the rate of 6% per annum from October 23, 1931.

By reason of the Statutes of the State of Arkansas therein made and provided to cover cases such as this, the defendant is also liable to pay plaintiff an amount equal to 12% of the principal sum and interest owed plaintiff by way of penalty, and a reasonable attorney's fee for the prosecution and collection of the same.

Wherefore, plaintiff asks judgment against the defendant in the sum of three thousand ($3,000) dollars, with interest thereon at the rate of 6% per annum from October 23, 1931, until paid, together with a penalty of 12% on said amount, and reasonable attorney's fee and all costs herein expended.

Sam T., Tom & Donald Poe,
Tom Poe,
Attorneys for Plaintiff.

Filed on the 8th day of December, 1931.

Jack Kight, Clerk.

IN THE CIRCUIT COURT OF HOT SPRING COUNTY

Marion Johnson.....Plaintiff,

v.

Missouri State Life Insurance Company.....Defendant.

Summons issued on the 8th day of December, 1932.

Summons served on the 9th day of December, 1932.

IN THE CIRCUIT COURT OF
HOT SPRING COUNTY, ARKANSAS

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company ..... Defendant.

AMENDMENT TO COMPLAINT

Comes the plaintiff, Marion Johnson, and for amendment to his original complaint herein, amends the following paragraph of said complaint, to-wit: "By reason of the statutes of the State of Arkansas therein made and provided to cover cases such as this, the defendant is also liable to pay plaintiff an amount equal to 12% of the principal sum and interest owed plaintiff by way of penalty, and a reasonable attorney's fee for the prosecution and collection of the same." Be and the same is hereby amended to read as follows:

By reason of the statutes of the State of Arkansas therein made and provided to cover cases such as this, the defendant is also liable to pay the plaintiff a reasonable attorney's fee for his attorney herein for the prosecution and collection of the sum due him herein, which should be taxed as costs in this action.

That plaintiff specifically waives the allegation contained in his original complaint to the effect that the defendant is also liable to pay to him an amount equal to 12% of the principal sum and interest owed plaintiff by way of penalty, and also his prayer for recovery of said penalty.

Plaintiff does not waive any other allegations contained in his original complaint herein.

Wherefore, plaintiff prays judgment against the defendant Missouri State Life Insurance Company, in the sum of $3,000 with interest thereon at the rate of 6% per annum from October 23, 1931, until paid, together with a reasonable attorney's fee for his attorneys herein and for all of his costs herein expended.

John L. McClellan,
Sam T., Tom and Donald Poe,
By John L. McClellan,
Attorneys for Plaintiff.

Filed on Jan. 16, 1932.

Jack Kight, Clerk.

By V. H. Kight, D. C.

IN THE HOT SPRING CIRCUIT COURT

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company ..... Defendant.

PETITION FOR REMOVAL

The petition of Missouri State Life Insurance Company, defendant in the above entitled action, respectfully shows to this Honorable Court:

That petitioner is defendant in the above entitled action.

That said action is of a civil nature.

That said plaintiff in his complaint herein, claims in substance thereon the 4th day of October, 1927, the defendant delivered to him its policy of insurance providing indemnity in the amount of $2,000 for total and permanent disability caused by bodily injury or disease, prior to attaining the age of sixty years. That on the 4th day of October, 1927, the defendant issued to said plaintiff its policy insuring the said plaintiff against dismemberment and loss of sight, in the amount of $1,000.

That during the month of March, 1930, the plaintiff suffered accidental bodily injuries by reason of an automobile overturning and falling upon him. That as a result thereof the plaintiff has lost the sight of his right eye and has become totally and permanently disabled. Plaintiff further claims that there is now due him under said policies the sum of $3,000 with interest thereon at 6% from October 23, 1931, and in addition thereto that he is entitled to a reasonable attorney's fee. A reasonable attorneys fee in case involving policies aggregating $3,000 would amount to at least $250.

Petitioner disputes said claim and denies all liability under the contract set out in the complaint herein.

That the matter in dispute in this action exceeds the sum of $3,000, exclusive of interest and costs.

That the controversy in this action, and every issue of fact and law therein is wholly between citizens of different states, and which can be fully determined as between them. That is to say, the plaintiff is now, and was at the

time of the filing of the complaint in this action, a citizen and resident of the State of Arkansas, and the defendant was then and still is a corporation organized and existing under the laws of the State of Missouri, and a citizen of said State of Missouri.

That the time for your petitioner as defendant in this action, to answer or plead to the complaint has not yet expired.

Your petitioner presents herewith a good and sufficient bond as provided by the statute in such cases, that it will enter in the district court of the United States, for the Western Division of the Eastern District of Arkansas, within thirty days from the filing of this petition, a certified copy of the record in this suit, and for the payment of all costs which may be awarded by the said court if the said district court shall hold that this suit was wrongfully or improperly removed thereto.

Petitioner therefore prays that this court proceed no further herein, except to make the order of removal as required by law, and to accept the bond presented herewith, and direct a transcript of the record herein to be made for said court as provided by law.

W. H. Glover,
Rose, Hemingway, Cantrell & Loughborough,
Attorneys for Petitioner.

State of Arkansas, County of Pulaski—

I, A. F. House, under oath, state that I am one of the attorneys representing the petitioner, Missouri State Life

Insurance Company. That I have read the foregoing petition, and that the allegations therein made are true to the best of my information and that no official of said petitioner is within the State of Arkansas.

A. F. House.

Subscribed and sworn to before me this 16th day of January, 1932.

Rebecca D. Norton,
Notary Public.

(Seal) My commission expires Nov. 1st, 1933.

Filed Jan. 18th, 1932.

Jack Kight, Clerk.
By V. H. Kight, D. C.

IN THE HOT SPRING CIRCUIT COURT

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Co. ..... Defendant.

BOND

KNOW ALL MEN BY THESE PRESENTS:

That we, Missouri State Life Insurance Company, as principal, and United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto Marion Johnson, plaintiff in the above entitled cause, his successors and assigns, in the sum of Five Hundred Dollars ($500), lawful

money of the United States of America, for the payment of which well and truly to be made, we and each of us bind ourselves, and each of us, our heirs, executors and administrators jointly and severally, by these presents.

The conditions of this obligation are such that:

WHEREAS, the said Missouri State Life Insurance Company has applied by petition to the Circuit Court of Hot Spring County, of the State of Arkansas, for the removal of a certain cause therein pending, wherein Marion Johnson is plaintiff, and the said Missouri State Life Insurance Company is defendant, to the district court of the United States for the Eastern District of Arkansas, Western Division, for further proceedings on grounds in the said petition set forth, and that all further proceedings in said action in said Hot Spring Circuit Court be stayed.

Now, therefore, if your petitioner, the said Missouri State Life Insurance Company, shall enter in said district court of the United States, for the Eastern District of Arkansas, Western Division, aforesaid, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and shall pay or cause to be paid all costs that may be awarded therein by said district court of the United States if said court shall hold that said suit was wrongfully or improperly removed, thereto, then this obligation be void; otherwise, shall remain in full force and effect.

MISSOURI STATE LIFE INS. CO.,
By Rose, Hemingway, Cantrell & Loughborough,
Attorneys.

PRINCIPAL

United States Fidelity & Guaranty Company,
By Wylie B. Miller,
Attorney in Fact.

SURETY

(SEAL)
Filed Jan. 18th, 1932.
Jack Kight, Clerk.
By V. H. Kight, D. C.

IN THE HOT SPRING CIRCUIT COURT

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company ..... Defendant.

ORDER ON PETITION FOR REMOVAL

This cause coming on for hearing upon petition and bond of the defendant herein for an order transferring this cause to the United States District Court for the Eastern District of Arkansas, Western Division, and it appearing to the court that the defendant has filed its petition for such removal in due form of law, and that the defendant has filed its bond, duly conditioned, with good and sufficient

sureties, as provided by law, and that defendant has given plaintiff due and legal notice thereof, but it appearing to the court that this is not a proper cause for removal to said District Court, it is therefore ordered that said petition be and the same is hereby overruled, to which action of the court the petitioner excepted and asked that its exceptions be noted of record, which is accordingly done.

Thomas E. Toler,
Judge.

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company..... Defendant.

On this 18th day of January, 1932, comes the defendant and files its petition and bond for removal to the Federal Court. Said petition is by the court overruled, to which ruling of the court in overruling said petition the defendant duly excepted and ask that their exceptions be noted of record, which is accordingly done.

IN THE HOT SPRING CIRCUIT COURT

Marion Johnson ..... Plaintiff,

v

Missouri State Life Insurance Company..... Defendant.

MOTION

The plaintiff herein claims that he lost the sight of his right eye as the result of an automobile accident. He also alleges that he is totally and permanently disabled by rea-

son of certain injuries to his spine and cervical vertebrae. This defendant has never had an opportunity to examine said plaintiff, and in order to properly prepare its defense herein, it asks that the plaintiff be required to submit to a physical examination by some physician appointed by the court, and that defendant be given a reasonable time after such examination to file its answer herein.

Rose, Hemingway, Cantrell & Loughborough,
Attorneys for Defendant.

Wm. H. Glover.

Filed on the 19th day of Jan. 1932.

Jack Kight, Clerk.

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company..... Defendant.

On this 20th day of January, 1932, motion to have plaintiff to submit to physical examination filed and is by the court granted. Whereupon the court appoints Drs. Hodges and Prickett to make the examination of plaintiff as ordered.

On this same day answer of defendant is filed and noted of record. Motion for continuance is also filed and noted of record.

IN THE HOT SPRING CIRCUIT COURT

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company..... Defendant.

ANSWER

It is not true that the plaintiff's spine was fractured and dislocated as the result of an automobile overturning and falling upon him. It is not true that the articulation between his fifth and sixth cervical vertebrae was crushed and is tilted. It is not true that callous has formed on both sides of the fifth and sixth cervical vertebrae. It is not true that the articulation between the sixth and seventh cervical vertebrae is narrowed. It is not true that there is a dislocation of the cervical column, beginning at the articulation of the fifth and sixth cervical vertebrae. It is not true that the structure of the cervical column above this site are displaced and out of line. It is not true that there is a tilting of the bodies of the third and fourth dorsal vertebrae. It is not true that there is an ankylosis of the cervical column and of the dorsal portion of the spine. It is not true that there is a chronic traumatic hypertrophic arthritis of the cervical and dorsal portions of the spine.

It is not true that the plaintiff lost the sight of his right eye as the result of an automobile overturning and falling upon him.

It is not true that the plaintiff, as a result of the alleged injury, has ever since suffered from mitral insufficiency,

hypertension, dyspnoea and a shock to his entire nervous system.

It is not true that he has been disabled and is physically unable to earn a livelihood since he was injured. It is not true that he is totally and permanently disabled by reason of said alleged diseases and bodily injuries.

It is not true that the plaintiff had duly performed all of the conditions of said policies and certificates on his part to be performed.

It is not true that the plaintiff, on or about the ..... day of May, 1930, within the time required for furnishing proof of loss, gave to the defendant due notice of his injury. It is not true that on or about October 23, 1934, he gave proof of loss and the duration of his disabilities.

It is not true that there is now due and owing from the plaintiff to the defendant the sum of $3,000, with interest thereon at the rate of six per cent per annum from October 23, 1931.

Answering further this defendant states that by the provisions of Group Policy No. ADD 501, and Certificate No. 1075, it is required that immediate written notice of any accident for which claim is made should be given, and that affirmative proof of loss on forms furnished by the defendant must be furnished to the company at its home office at St. Louis, Mo., within ninety days after the date of the loss, for which the claim is made. The required notice was not given, and the plaintiff did not furnish affirmative proof of loss on the company's forms within a period of ninety days.

Certificate No. 1075, issued under Group Policy G-2377, contains the following provisions:

"If the employee shall furnish the company with due proof that before having attained the age of sixty years he or she has become totally and permanently disabled by bodily injury or disease, and that he or she is then and will be at all times thereafter, wholly prevented thereby from engaging in any gainful occupation, and that he or she has been so permanently and totally disabled for a period of six months, the company will immediately pay to the employer in full settlement of all the obligations hereunder, the amount of insurance in force hereunder on the employee at the time of the approval by the company of the proofs as aforesaid."

The plaintiff herein did not become totally and permanently disabled by bodily injury or disease prior to attaining the age of sixty years.

Answering further, this defendant stated that it has reasonable grounds for declining to pay the plaintiff's claim, and to assess an attorney's fee against it pursuant to the provisions of section 6155 of Crawford & Moses' Digest will deprive it of its property without due process of law, and deny to it the equal protection of the laws in contravention to the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, defendant prays that the complaint be dismissed and that it have judgment for its costs.

Rose, Hemingway, Cantrell & *et al.*

Filed Jan. 20th, 1932.

Jack Kight, Clerk.

IN THE HOT SPRING CIRCUIT COURT

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company ..... Defendant.

MOTION FOR CONTINUANCE

The defendant asks that the court continue this case for the term, and for cause states:

That the complaint herein was filed on the 8th day of December, 1931, and the plaintiff prayed for judgment for the sum of Three Thousand ($3,000) the statutory penalty of twelve (12) per cent, and a reasonable attorney's fee. This stated a cause of action which was removable to the United States District Court, Western Division, Eastern District of Arkansas, and on January 18th, 1932, the defendant herein served notice upon attorneys representing the plaintiff that it would, on Monday, January 18th, 1932, move the court for an order removing said cause to said Federal Court. Counsel for plaintiff, a short time subsequent to the service of the notice to remove filed an amendment to the complaint, in which the claim for the statutory penalty of twelve (12%) was eliminated. Upon filing the petition and bond for removal, the court herein declined to remove the case upon the theory that the elimination of the claim for the statutory penalty deprived the Federal Court of jurisdiction.

Plaintiff herein sues upon an accident policy which requires the giving of notice within a prescribed period, and

this defendant, as one of its defenses, will claim that the required notice was not given. All of the officials of the company who are familiar with the claim, and the absence of required notice, reside in St. Louis, Missouri, and the defendant is desirous of taking their depositions to be used in the trial of this cause.

But for the stating of a cause which was removable, prior to the amendment of the complaint herein, the defendant would have made preparations for the trial of this cause, and would have taken the depositions of the St. Louis witnesses and it now prays that the court continue this cause for the term.

W. H. Glover, Rose, Hemingway, Cantrell and Loughborough,

Attorneys for Defendant.

VERIFICATION

State of Arkansas, County of Pulaski—

I, A. F. House, under oath say that I am one of the attorneys representing the defendant. That the allegations in the foregoing motion are true.

A. F. House.

Subscribed and sworn to before me this 19th day of January, 1932.

Rebecca D. Norton,

(Seal) Notary Public.

My commission expires Nov. 1, 1933.

Filed Jan. 20, 1932.

Jack Kight, Clerk.

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company..... Defendants.

On this 22nd day of January, 1932, comes the plaintiff Marion Johnson and by his attorney J. L. McClellan and comes also the defendant Missouri State Life Insurance Company by its attorneys and at this time motion for continuance coming on to be heard, same having been filed on the 20th day of January, 1932, and after hearing said motion the same is by the court overruled, to which ruling of the court in overruling said motion the defendant duly excepted and ask that its exceptions be noted of record which is accordingly done.

Whereupon this cause coming on to be heard same having been reached upon the regular call of the docket, comes the plaintiff Marion Johnson, and by his attorneys Tom Poe and J. L. McClellan and comes also the defendant Missouri State Life Insurance Company by its attorneys and both parties announce ready for trial.

Whereupon comes E. T. Phillips and eleven others of the regular panel of the petit jury who are duly sworn to answer questions as to their qualifications, found competent, duly selected, empaneled and sworn to try said cause. And after hearing all the evidence adduced by both parties herein, instructions of the court and argument of counsel, retired to consider of its verdict and after due deliberations returned into open court with the following verdict, to-wit:

"We, the jury, find for the plaintiff in the sum of $3,000 with interest at 6% per annum from Oct. 23, 1931. Signed by jurors as follows: E. T. Phillips, W. H. Thornton, Selmon Price, Sam Owens, Tom Wright, Clarkes Backman, Roy Sanders, C. Hughes and Jewell Petties.

It is therefore considered, ordered and adjudged by the court that the plaintiff Marion Johnson do have and recover of and from the defendant Missouri State Life Insurance Company the sum of $3,000 with interest at the rate of 6% per annum from the 23rd day of Oct., 1931. It is further ordered that the plaintiff herein do have and recover of and from defendant herein all his cost in this action. All of which execution may issue.

IN THE HOT SPRING CIRCUIT COURT

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company ..... Defendant.

MOTION TO TAX ATTORNEY'S FEE

Comes the plaintiff, Marion Johnson, and moves the court to tax as costs in this case an attorney's fee, as provided by section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas.

John L. McClellan and

Sam T., Tom & Donald Poe,

Attorneys for Plaintiff.

Johnson

v.

Missouri State Life Insurance Company.

In the month of October, 1931, Marion Johnson, formerly employed as a mechanic in the planing mill in the Missouri Pacific Railroad Company shops in North Little Rock, Arkansas, consulted the law firm of Sam T. & Tom Poe asking advice as to whether he could recover a total and permanent disability benefits and also accidental loss of sight of one eye from Missouri State Life Insurance Company in the amount of $2,000 and also $1,000 under two certificates of insurance issued to Mr. Johnson by the insurance company while an employee of the Missouri Pacific Railroad Company. The certificates of insurance had been issued Mr. Johnson on October 4, 1927, by reason of two separate group insurance policies issued by Missouri State Life Insurance Company to Missouri Pacific Railroad Company covering all its employees.

The certificate of insurance providing payment of total and permanent disability benefits in the amount of $2,000 to Mr. Johnson contained a clause which was as follows, to-wit:

"If the employee shall furnish the company with due proof that before having attained the age of sixty years, he or she has become totally and permanently disabled by bodily injury or diseases, and that he or she is then, and will be at all times thereafter, wholly prevented thereby from engaging in any gainful occupation and that he or

she has been so permanently and totally disabled for a period of six months, the company will immediately pay to the employee in full settlement of all obligations hereunder, the amount of insurance in force hereunder on the employee at the time of the approval by the company of the proofs aforesaid.'"

The certificate of insurance providing payment of benefits to Mr. Johnson in event of the accidental loss of sight of one eye contained a benefit clause which was as follows, to-wit:

"This is to certify that under and subject to the terms and conditions of a Group Policy of Accidental Death and Dismemberment Insurance, No. ADD-501, issued and delivered to the Missouri Pacific Railroad Company (hereinafter called the employer) by the Missouri State Life Insurance Company (hereinafter called the Company) Marion Johnson, while an employee of the employee of the employer, and during the continuance of said policy, shall, in the manner therein provided, be insured for the sum of $2,000 (hereinafter called the entire amount payable).

"DISMEMBERMENT AND LOSS OF SIGHT

"(b) for the amount indicated opposite each loss in the following schedule, provided such loss, resulting from bodily injuries effected through external, violent and accidental means independently of all other causes, shall occur within ninety (90) days from the date of accident.

"ACCIDENTAL LOSS OF

.....

Sight of one eye. .....One-half entire amount payable.

....."

Mr. Johnson, as an employe of the Missouri Pacific Railroad Company, was also issued a third certificate of insurance under another group policy issued by Missouri State Life Insurance Company to the employees of the Missouri Pacific Railroad Company. This certificate paid disability benefits to Mr. Johnson in case of total disability by reason of accident or illness at the rate of $15 per week for a period of time not exceeding 26 weeks. Disability benefits had been paid by Missouri State Life Insurance Company for about 5 weeks at the rate of $15 per week prior to the time he employed attorneys to collect the total and permanent disability benefits and also for accidental loss of sight from Missouri State Life Insurance Company.

Under the terms of the group policies of insurance between Missouri State Life Insurance Company and Missouri Pacific Railroad Company, the premiums paid by Mr. Johnson were deducted from the wages paid by the railroad company to Mr. Johnson monthly and paid to the insurance company. The premiums were not paid by Mr. Johnson to Missouri State Life Insurance Company subsequent to December, 1930.

Mr. Johnson stated he was injured on March 8, 1930, when an automobile in which he was riding overturned and pinned him beneath it. He remained under the automobile

for several minutes and the entire weight of the automobile rested on and across his neck and shoulders. As a result of the injuries received, Mr. Johnson was rendered unconscious and suffered intense and severe pain. He was carried to a hospital in Malvern, Arkansas, where he was attended and treated by a physician. The same night Mr. Johnson was removed to the home of his daughter in Malvern, Arkansas, where he was bedfast for one week, being unable to get out of bed without assistance. He lost the sight of his right eye and was also unable to use his arms or to rotate or flex his head and neck in either direction. Later Mr. Johnson was removed to his home near Rolla, Arkansas, where he remained in bed for several weeks. No X-ray picture was made of Mr. Johnson's neck or spine to determine if he had received any dislocation or fracture at the time he was treated for the injuries immediately following the automobile accident. When the acute pain subsided he had a limitation of motion in the neck, head and shoulders and was unable to perform hard manual labor as he had done before he was injured. He could not bend, stoop or lift heavy objects except with great discomfort and intense pain. His neck felt like it was broken and he had a shortness of breath and suffered continuously with headaches.

Although he felt physically unable to do so, Mr. Johnson returned to work at the Missouri Pacific Railroad Company shops in North Little Rock, Arkansas, in May, 1930, and continued to work there off and on at irregular intervals until December, 1930. He was assisted in performing the duties required of him by his fellow employees during all

that time and the duties required of him were also lighter than he had been accustomed to perform before he was injured. Mr. Johnson did not attempt to work after December, 1930. He attained the age of 60 years on July 10, 1930.

Mr. Johnson was examined by a physician in October, 1931, and also had an X-ray picture made of his neck and spine at that time. This examination and the X-ray revealed his neck was dislocated and two of the cervical vertebrae were fractured and crushed. Some of the thoracic, or dorsal, vertebrae were also injured. Ankylosis and arthritis had also developed in both the cervical and dorsal regions of the spine.

Mr. Johnson was without funds to pay court costs or attorney's fee. On October 23, 1931, he employed John L. McClellan and Sam T. & Tom Poe to represent him in the collection of the disability benefits due him by Missouri State Life Insurance Company. The agreement to pay the attorneys was contingent upon the success of the attorneys in obtaining a recovery for Mr. Johnson. It was agreed if the claim was collected without the necessity of litigation that 25 per cent of the total amount recovered would be paid by Mr. Johnson to the attorneys; and, if litigation was required to collect, that Mr. Johnson would pay the attorneys 50 per cent of the total amount recovered.

Payment of the disability benefits due Mr. Johnson was demanded of the Missouri State Life Insurance Company by the attorneys on October 23, 1931. The Missouri State Life Insurance Company refused to pay the claim.

The original letter of Missouri State Life Insurance Company to Sam T. & Tom Poe, attorneys, and dated November 5, 1931, denying all liability under the two certificates of insurance is attached hereto, marked Exhibit No. 1 and made a part hereof.

Liability under the certificate providing for total and permanent disability benefits was specifically denied because Mr. Johnson had attempted to work after he had attained the age of 60 years. The reason given for refusing to pay the claim under the certificate providing for indemnity in event of accidental loss of sight of one eye was predicated upon failure of the insured to give immediate written notice of the accident and also to furnish affirmative proof of loss within 90 days after the automobile accident in which Mr. Johnson was injured.

Suit was filed on December 8, 1931, in the Hot Spring County, Arkansas, Circuit Court, to enforce collection of the disability benefits due Mr. Johnson. The statutory penalty and attorney's fee were asked in addition to the amount of the claim, which was $3,000 and interest.

Prior to the time the defendant insurance company was required to plead, plaintiff amended his complaint and omitted the prayer for judgment for the statutory penalty of 12 per cent as provided by section 6155 of Crawford & Moses' Digest.

The defendant insurance company served notice on attorneys for plaintiff that it would file a petition for removal to the United States District Court at the time it was first required to plead in the Hot Spring Circuit Court.

The Hot Spring Circuit Court denied the petition for removal to the United States District Court. Thereupon, a motion for continuance was filed by defendant insurance company, which was also denied by the Hot Spring Circuit Court.

An answer was filed, defendant company denying plaintiff was totally and permanently disabled before having attained the age of 60 years; and also denying that he had lost the sight of one eye. It was also contended in its answer that plaintiff had failed to give immediate written notice of the accident or that he had furnished affirmative proof of loss within 90 days after the accident.

It was also contended by the insurance company that it had reasonable grounds for declining to pay plaintiff's claim for total and permanent disability benefits and that to assess an attorney's fee against it as provided by section 6155 of Crawford & Moses' Digest would deny to it the equal protection of the laws, and deprive it of its property without due process of law, in contravention of the 14th Amendment to the Constitution of the United States.

It is the avowed intention of defendant, Missouri State Life Insurance Company, to appeal this case to the Supreme Court of the State of Arkansas and, if unsuccessul there, to prosecute an appeal to the Supreme Court of the United States.

The case was set for trial on January 21, 1931, but was passed because of being crowded off the docket.

It was reset for trial on January 22, 1931, when it was tried and a verdict was returned for plaintiff for the full

amount for which suit was filed. The trial required one (1) day.

At the trial eighteen (18) witnesses testified on behalf of the plaintiff. Six (6) of these witnesses were medical experts.

Four (4) witnesses testified at the trial on behalf of the defendant.

In the preparation of the case for trial the attorneys were required to and did devote the better part of twenty (20) days to preparing the case for trial. This consisted of interviews with the plaintiff and his witnesses, many of whom were medical experts; the searching for and finding of records of hospitals and the railroad company by which plaintiff was employed; in preparing instructions; searching the authorities to determine if plaintiff was entitled to collect the disability benefits; reading medical text books treating of the symptoms, conditions and injuries from which plaintiff suffered.

In preparing the case for trial in the Hot Spring Circuit court, and in the trial, the plaintiff and his attorneys were required to incur expenses in the amount of $388.94, all of which has either been paid or will have to be paid by plaintiff and his attorneys.

Assuming the above statement of facts to be true, what in your opinion, would be a reasonable attorney's fee (1) for the trial of this case in the Hot Spring County, Arkansas, Circuit Court?; (2) for trial of this case in the Supreme Court of Arkansas?; (3) for the trial of this case in the Supreme Court of the United States

MISSOURI STATE LIFE INSURANCE COMPANY.

HOME OFFICE, SAINT LOUIS

Hillaman Taylor, President.

CLAIM DEPARTMENT

November 5, 1931.

Messrs. Sam T. & Tom Poe,
Attorneys at Law,
510 Wallace Building,
Little Rock, Arkansas.

Re: Policies G-2377, ADD-501 & SAH-534
Missouri Pacific Railroad Company Certificates
1075
Marion Johnson

Gentlemen:

Supplementing my letter of October 26, the investigation which we have thus far made definitely establishes that this party worked on a full time and full pay basis after attaining age sixty and that he received full payment under his insurance for temporary disability as he sustained during the period his insurance was in force. Because of this, there does not seem to be any liability on our part either under the Group Life policy.

Neither does there appear to be any liability under policy ADD-501 for the alleged loss of sight of one eye sustained in March, 1930, as apart from the fact that immediate written notice was not given us of such loss, as required by the terms of this policy contract, affirmative proof of loss was not furnished us at our Home Office here in St.

Louis within ninety days after the date of the loss, as also required by the policy contract. The following further provision of the policy contract seems applicable to this alleged claim: "No legal proceedings for recovery hereunder shall be commenced within three months nor after one year from the date of any loss for which the Company shall be liable."

Yours very truly,

C. J. Loftus,
Manager, Group Life Claim Division.

"EXHIBIT No. 1"

State of Arkansas, County of Pulaski—

Tom Poe, on oath, states that he is one of the attorneys for the plaintiff in the above entitled cause and that he is familiar with the facts set out in the statement of facts attached to plaintiff's motion to tax attorney's fee as costs in this action and that said statement of facts hereto attached are true.

Tom Poe

Subscribed and sworn to before this 25th day of January, 1932.

(SEAL) Grace Lassiter,
Notary Public.

My commission expires July 30, 1932.

Filed on January 26th, 1932.

Jack Kight, Clerk.

IN THE HOT SPRING CIRCUIT COURT

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company ..... Defendant.

ORDER

On this day comes on plaintiff's application for the allowance of an attorney's fee, and the same is submitted to the court upon the testimony of John McClellan, H. B. Means, Sam Poe, Jabez Smith, W. H. Glover, Jr., Tom Roland, A. I. Roland, D. M. Halbert and Albert Jernigan, and the court being well and sufficiently advised, doth find that the plaintiff is entitled to an attorney's fee of $550, and the same is hereby assessed and taxed as a part of the costs in this case.

The defendant at the time excepted to the court's action of fixing the attorney's fee in the amount of $550 for the reason that the same is excessive, and asked that the same be noted of record, which is accordingly done, and the defendant at the same term excepted to the action of the court in assessing any attorney's fee at all for the reason that it had reasonable grounds for contesting this claim, and that the assessing of the attorney's fee under the circumstances will deny to it the equal protection of the laws, and deprive it of its property without due process of law in contravention to the Fourteenth Amendment to the Constitution of the United States.

The defendant asked that its exceptions on this ground be noted of record, which is accordingly done.

Thomas E. Toler, Circuit Judge.

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company ..... Defendant.

Filed for and on Jan. 28, 1932. Jack Kight, Clerk.

On this 26th day of January, 1932, defendant is given until Friday, 29th day of January, 1932, to file motion for a new trial herein.

On this same motion by plaintiff to tax attorney's fee as cost filed. Also motion to strike from above motion filed, and said motion coming on to be heard and after hearing said motion the same is by the court overruled, to which ruling of the court in overruling said motion the defendant duly excepted and asked that its exceptions be noted of record, which is accordingly done.

The matter of determining amount of attorney's fee to be taxed as a part of the cost came on to be heard and after hearing testimony of D. M. Halbert, Tom Roland, A. W. Jernigan, A. I. Roland and J. M. Smith, attorneys of this bar, and argument of counsel, the court finds that the attorney's fee should be $550.

It is therefore considered, ordered and adjudged by the court that the attorneys, J. L. McClellan and Tom Poe, should have and recover of and from the defendant herein the sum of $550.

IN THE HOT SPRING CIRCUIT COURT

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company ..... Defendant.

MOTION FOR A NEW TRIAL

Comes the defendant, and moves the court to set aside the judgment rendered herein and grant a new trial for the following reasons:

1. Because the verdict is contrary to the law.

2. Because the verdict is contrary to the evidence.

3. Because the verdict is contrary to both the law and the evidence.

4. Because the court erred in overruling defendant's petition to remove this case to the United States District Court.

5. Because the court erred in giving plaintiff instruction number 1, over the objection of the defendant.

6. Because the court erred in giving plaintiff's instruction number 2, over the objections of the defendant.

7. Because the court erred in giving plaintiff's instruction number 3, over the objections of the defendant.

8. Because the court erred in giving plaintiff's instruction number 4, over the objection of the defendant.

9. Because the court erred in giving plaintiff's instruction number 4, over the objection of the defendant.

10. Because the court erred in giving plaintiff's instruction number 6, over the objection of the defendant.

11. Because the court erred in giving plaintiff's instruction number 7, over the objection of the defendant.

12. Because the court erred in giving plaintiff's instruction number 8, over the objection of the defendant.

13. Because the court erred in modifying defendant's instruction number 3 by adding the words: "and was not totally and permanently disabled during that time."

14. Because the court erred in modifying defendant's instruction number 10 by adding the following clause: "Provided you find the defendant, by its acts herein, has not waived proof of loss, as defined in these instructions."

15. Because the court erred in refusing to give defendant's instruction number 1.

16. Because the court erred in refusing to give defendant's instruction number 2.

17. Because the court erred in refusing to give defendant's instruction number 5, and erred in modifying said instruction.

18. Because the court erred in refusing to give defendant's instruction number 3, and erred in modifying said instruction.

19. Because the court erred in taxing an attorney's fee of $550 against the defendant, which is excessive.

20. Because the court erred in taxing an attorney's fee of $550 against the defendant, when the defendant had reasonable grounds for contesting this claim.

WHEREFORE, defendant prays that the verdict of the jury, and the judgment rendered herein, be set aside, and that it be granted a new trial.

W. H. Glover,

Rose, Hemingway, Cantrell & Loughborough,

Attorneys at Law.

Filed: Jan. 28, 1932.
Jack Kight, Clerk.

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company ..... Defendant.

On this 28th day of January, 1932, comes the defendant herein and files its motion for a new trial herein and said motion coming on to be heard, and after hearing said motion the same is by the court overruled, to which ruling of the court in overruling said motion the defendant at this time duly excepted and ask that its exceptions be noted of record, which is accordingly done.

Whereupon, the defendant at this time prays an appeal to the Supreme Court of Arkansas, which is by the court granted. Defendant given 90 days in which to prepare and file its bill of exceptions with the clerk of this court.

State of Arkansas, County of Hot Spring—

I, Jack Kight, circuit clerk within and for the said county and State aforesaid, do hereby certify that the foregoing typewriting matter contains a true, complete and compared copy of records and proceedings in the circuit court of said county in which Marion Johnson was plaintiff and Missouri State Life Insurance Company was defendant.

In witness whereof, I have hereunto set my hand and affixed the seal of said court on this the 12th day of March, 1932.

Jack Kight,

(SEAL) Circuit Clerk

No. 2591

Missouri State Life Insurance Co.

v. Hot Spring, Thos. E. Toler, J., $11.50

Marion Johnson

Transcript,

Filed March 14, 1932.
W. P. Sadler, Clerk.
By C. R. Stevenson, D. C.

State of Arkansas—In the Supreme Court—

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the court room, in the State House, in the city of Little Rock, on the 23rd day, being the fourth Monday of May, A. D. 1932, the following proceedings were had, to-wit:

• • •

November 14, 1932

Missouri State Life Insurance Company.....Appellant,

v. 2591 Appeal from Hot Spring Circuit Court

Marion Johnson .....Appellee.

This cause came on to be heard upon the transcript of the record of the circuit court of Hot Spring County, and was argued by counsel, on consideration whereof it is the opinion of the court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things affirmed with costs, and that said appellee recover of said appellant and Hartford Accident & Indemnity Company, surety in the supersedeas bond filed in this cause, the sum of THREE THOUSAND DOLLARS, with interest at six per cent per annum from the 23rd day of October, 1931, as adjudged by said circuit court, and the further sum of FIVE HUNDRED AND FIFTY DOLLARS, as her attorney's fee adjudged by said circuit court to be taxed as costs.

It is further considered that said appellee recover of said appellant and said surety all her costs in this court and the court below, including the attorney fee aforesaid, in this cause expended, and have execution thereof.

IN THE SUPREME COURT OF ARKANSAS

November 14, 1932

MISSOURI STATE LIFE INSURANCE CO. *v.* JOHNSON

OPINION

HUMPHREYS, J. Appellee instituted suit against appellant in the circuit court of Hot Spring County to recover $2,000 for permanent injuries received by him in an automobile accident on a certificate of insurance issued to him by appellant under Group Policy G-2377, issued by appellant to the Missouri Pacific Railroad Company, protecting its employees from total disability on account of bodily injury or disease and to recover $1,000 for the loss of an eye in the same accident on a certificate of insurance issued to him by appellant under Group Policy ADD-501, issued by appellant to the same railroad company, protecting its employees against accidental injuries. Appellee alleged that he was totally and permanently injured in an automobile accident on the 8th day of March, 1930, before he attained the age of sixty years and, as a result of the accident, also lost the sight of his right eye, and prayed for judgment in the sum of $3,000 and costs, including an attorney's fee.

Appellant filed a motion to transfer the cause to the United States District Court for the Eastern District of Arkansas, alleging a diversity of citizenship and that the amount sued for, including an attorney's fee, exceeded $3,000. This motion was denied over the objection and exception of appellant.

Appellant, reserving its objection to the jurisdiction of the court to try the cause, filed an answer denying the material allegations of the complaint.

The cause was submitted upon the pleadings and testimony, resulting in a judgment for $3,000 and costs, including an allowance of an attorney's fee in the sum of $550, from which is this appeal.

The group insurance policies were issued and delivered to the Missouri Pacific Railroad Company and remained in its possession in its general office at St. Louis. They were never in the possession of appellee nor subject to his inspection as far a the record reflect. The certificates were the only documents issued to him under the terms of the major policies. The only provision in the certificates as to either notice or proof of loss is as follows:

"Immediately upon receipt of due proof of loss, the company will pay to the employee in full settlement of all obligations hereunder, the amount set opposite such loss: * * *."

Only those protected under Group Policy G-2377 were eligible for protection under Group Policy ADD-501. Group Policy ADD-501 contained the following provision relative to notice and proof of claim:

"Immediate written notice with full particulars and full name and address of insured employee shall be given by the employer to the company of any accident, injury, or loss for which claim shall be made under the terms thereof. Affirmative proof of loss, on forms furnished by the com-

pany, must be furnished to the company at its home office, St. Louis, Missouri, within ninety days after the date of the loss for which claim is made."

Group Policy G-2377 and the certificate issued under same provides that indemnity benefits of $2,000 shall be payable only if the insured, before attaining the age of sixty years, has become totally and permanently disabled; and Group Policy ADD-501 and the certificate issued under same provide that an indemnity of $1,000 shall be paid for the loss of one eye resulting from bodily injuries effected through external, violent, and accidental means, independently of all other causes, * * *.

The facts, stated most favorably to appellee, are as follows:

On March 8, 1930, before appellee attained the age of sixty years, he was injured in an automobile wreck. As a result of the accident, appellee received a severe injury to his neck and spine and lost the sight of his right eye. After recovering to some extent from the injury to his neck and spine, he returned to his work on April 28, 1930, and performed the light duties connected with the character of work he was employed to do with the assistance and aid of his co-laborers until the shops closed down in December, 1930. He was unable to do the heavy work connected with his job. He did not realize the serious condition of his neck and spine until October, 1931, at which time Dr. Law of Little Rock made an X-ray picture of the injured parts, which revealed that his neck bones had been fractured. The picture showed that there was a compression type

fracture of the bodies of the fifth and sixth cervical vertebrae; that the sixth cervical vertebrae was crushed and tilted; that there was a dislocation of the cervical column; that the thoracic and dorsal vertebrae were jammed together; that the articulation between the vertebrae in the lower spine were narrowed and the bodies of the third and fourth dorsal vertebrae tilted; and that ankylosis had followed as a result of the injuries to the spine.

According to the testimony of a majority of the physicians who were witnesses in the case, appellee should never have returned to work and that his neck and spine injuries permanently disabled him from performing hard manual labor. His duties required that he peform labor of that character.

Appellant contends for a reversal of the judgment upon the ground that the trial court erred in denying its petition for removal of the cause to the Federal Court. It is argued that to include an attorney's fee in the amount sued for exceeds $3,000, interest and costs and in amount makes the cause a removable one under the Federal Removal Statute. This court has ruled otherwise in the case of *Mutual Life Ins. Co.* v. *Marsh,* 185 Ark. 332. In the case referred to, it was ruled that an attorney's fee in cases of this nature must be taxed as costs in compliance with the express terms of section 6135 of Crawford & Moses' Digest.

Appellant also contends for a reversal of the judgment on the ground that the undisputed testimony reflects that appellee was not totally and permanently disabled. This court has said that total disability as used in con-

tracts of this character exists when the injury of the insured prevents him from doing all the substantial and material acts necessary to be done in the prosecution of his business and that common care and prudence would require him, in his condition, not to do. *Industrial Mutual Insurance Co.* v. *Hawkins,* 94 Ark. 417, 127 S. W. 457; *Mutual Benefit Health & Accident Association* v. *Bird,* 185 Ark. 445. The testimony in the instant case tends to show that appellee should not have attempted to perform his accustomed duties in the due exercise of common care and prudence. The testimony warranted the submission of the issue of total and permanent disabilty of appellee to the jury.

Appellant also contends for a reversal of the judgment on the ground that appellee failed to notify appellant within a reasonable time of his total and permanent disability and loss of eye resulting from the automobile accident. It is true, as argued, that he did not notify appellant of the accident and consequent injuries for about nineteen months, but he testified that his failure was due to the fact that the major policy requiring that notice be given was not in his possession or subject to his inspection. The requirement for notice and proof of the injuries was not in the certificate delivered to him. When he obtained information that notice was required, he notified appellant. The question as to whether he gave the notice within a reasonable time was a question for the jury and not the court. The facts in this case bring it within the rule announced in the cases of *Concordia Fire Insurance Com-*

pany v. *Waterford,* 145 Ark. 420, 224 S. W. 953, and *Missouri State Life Insurance Company* v. *Barron,* ms. op.

Under our view of the case, the issue whether the injury received by appellee in the automobile accident resulted in permanent and total disability and the loss of his right eye, and whether he gave appellant timely notice were questions for determination by the jury under proper instructions. We have examined the instructions and find no conflict in them and that they correctly announced the law applicable to the facts in the case.

No error appearing, the judgment is affirmed.

IN THE SUPREME COURT OF ARKANSAS

Missouri State Life Insurance Company.....Appellant,

v.

Marion Johnson .....Appellee.

PETITION FOR REHEARING

The appellant, Missouri State Life Insurance Company, petitions this court for a rehearing upon the following grounds:

First: This court erred in holding that this case was not removable to the Federal court.

Second: The court erred in holding that the question as to whether the appellee had given notice of the loss of the sight of his eye within a reasonable time was for the jury.

Third: The court erred in holding that there was no error on the part of the lower court in giving appellee's instruction No. 5.

Attached hereto is brief in support of this petition for rehearing.

Allen May,

W. H. Glover,

Rose, Hemingway, Cantrell & Loughborough,

Attorneys for Appellant.

Filed Nov. 30, 1932.
W. P. Sadler, Clerk.

Proceedings December 12, 1932

REHEARING PETITIONS DENIED:

Being fully advised, the petitions for rehearing filed in the following causes are by the court severally overruled, viz:

2591. *Missouri State Life Insurance Company* v. *Marion Johnson*

* * *
* * *

IN THE SUPREME COURT OF ARKANSAS

Missouri State Life Insurance Company.....Appellant,

v.

Marion Johnson .....Appellee.

ORDER

Whereas, in the above entitled cause, the appellant contemplates an application to the Supreme Court of the United States for a writ of certiorari to review the judgment in this cause rendered by the Supreme Court of the State of Arkansas on the 14th day of November, 1932; and

Whereas said appellant has presented to me, a justice of said court, a bond conditioned according to law in such cases, which I do hereby approve;

Now, therefore, I grant a stay of execution upon the judgment rendered in this cause by the Supreme Court of Arkansas, as aforesaid, until the 14th day of February, 1933; and in case the appellant shall make application for such certiorari to the Supreme Court of the United States within that time, such execution shall be stayed until the Supreme Court of the United States has acted upon the appellant's application, and if such writ of certiorari is granted by the Supreme Court of the United States and the judgment herein is reversed, the bond aforesaid shall be void.

Frank G. Smith,
Justice, Supreme Court of Arkansas.

Filed Dec. 27, 1932.
W. P. Sadler, Clerk.

IN THE SUPREME COURT OF ARKANSAS

Missouri State Life Insurance Company.....Appellant,

v.

Marion Johnson .....Appellee.

STAY BOND

Whereas, on the 14th day of November, 1932, there was rendered in the Supreme Court of Arkansas, a final judgment in favor of Marion Johnson against the undersigned Missouri State Life Insurance Company for the sum of three thousand dollars ($3,000), with interest and costs, which costs includes an attorney's fee of five hundred and fifty dollars ($550); and

WHEREAS the said Missouri State Life Insurance Company desires to apply to the Supreme Court of the United States for a writ of certiorari to review the judgment aforesaid:

NOW, THEREFORE, the undersigned, Missouri State Life Insurance Company, as principal, and the undersigned, NATIONAL SURETY COMPANY as surety, hereby obligate themselves to the said Marion Johnson, his heirs and assigns, in the full sum of five thousand dollars ($5,000); YET, upon condition that if the said Missouri State Life Insurance Company shall fail to make application for said writ of certiorari within the period allowed therefor, or fails to obtain an order granting its application, or fails to make its plea good in the Supeme Court of the United States, it shall answer for all damages and costs which the said Marion Johnson may sustain by reason of the stay; but if application for certiorari is made in due time and granted, and the judgment aforesaid is reversed, then this bond shall be null and void.

IN WITNESS WHEREOF, the Missouri State Life Insurance Company has executed this instrument as prin-

cipal, by the hand of its attorneys and the undersigned NATIONAL SURETY COMPANY, as surety, has executed the same by the hand of its agent and under its corporate seal, this 23rd day of December, 1932.

MISSOURI STATE LIFE INSURANCE COMPANY,
By Rose, Hemingway, Cantrell & Loughborough,
Attorneys.
Principal.

NATIONAL SURETY COMPANY,
By Sid B. Redding, Agent and Resident Vice President,
(SEAL) Surety.

Filed Dec. 27, 1932.
W. P. Sadler, Clerk.

State of Arkansas—In the Supreme Court—

I, W. P. Sadler, clerk of said court, do hereby certify that the foregoing pages, numbered from 1 to ..... inclusive, are a true, full and complete transcript of the record called for by stipulation of counsel contained herein, in the case of *Missouri State Life Insurance Company, Appellant,* v. *Marion Johnson, Appellee,* together with the proceedings in and the opinion of the Supreme Court of Arkansas, and a copy of the bond filed by the appellant on his request for stay of judgment.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Little Rock, Arkansas, this 10th day of March, 1933.

W. P. Sadler,
Clerk, Supreme Court of Arkansas.
(SEAL) By C. R. Stevenson, D. C.

SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR WRIT OF CERTIORARI—Filed March 11, 1933

On consideration of the motion of counsel for petitioners in the above entitled cause, and good cause therefor having been shown,

It is now here ordered that the time within which petition for Writ of Certiorari may be filed herein be, and the same is hereby, extended for a period of 30 days from this date.

Pierce Butler, Associate Justice of the Supreme Court of the United States.

Dated this 10th day of March, 1933.

[File endorsement omitted.]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 8, 1933

The petition herein for a writ of certiorari to the Supreme Court of the State of Arkansas is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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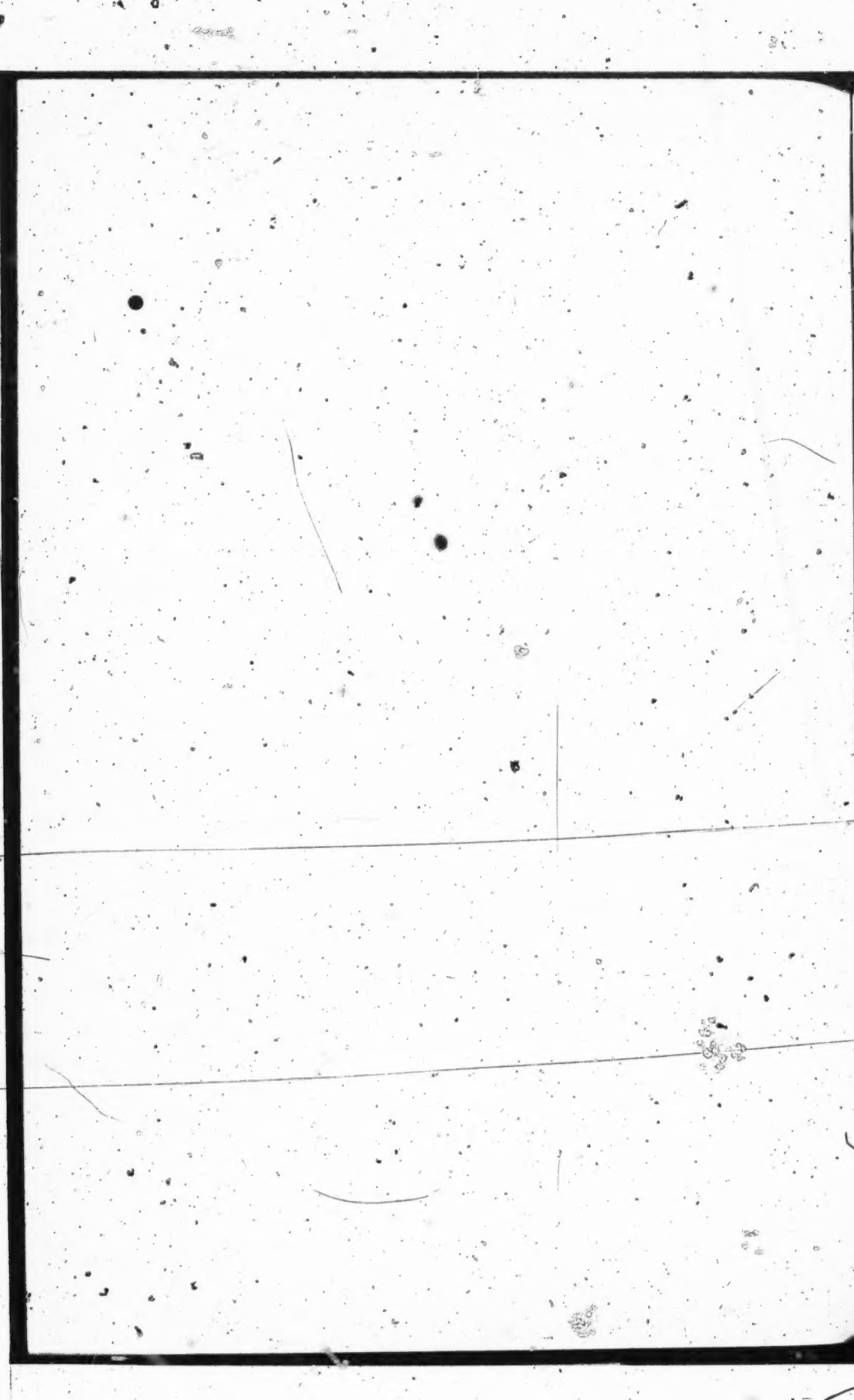
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

MISSOURI STATE LIFE INSURANCE COMPANY,
A CORPORATION, AND
HARTFORD ACCIDENT & INDEMNITY COMPANY,
A CORPORATION ..... *Petitioners,*

v.

MARION JOHNSON ..... *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Missouri State Life Insurance Company, a corporation, and Hartford Accident & Indemnity Company, a corporation, respectfully pray that a writ of certiorari issue to review the judgment entered November 14, 1932, in the Supreme Court of Arkansas in the above entitled cause. A seasonably filed petition for rehearing in said cause was denied December 12, 1932, on which date said judgment became final and effective. Upon applica-

tion seasonably made on March 10, 1933, by the petitioners to Associate Justice Butler, of this Honorable Court, an order was signed by the said Justice extending the time within which petitioners might apply for a writ of certiorari in this cause for a period of thirty (30) days from said March 10, 1933.

OPINIONS BELOW

The judgment of the Hot Spring Circuit Court (R. 24) is not reported. The opinion of the Supreme Court of Arkansas (R. 42) is not reported.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered November 14, 1932 (R. 41, 42). A seasonably filed petition for rehearing in said cause in said court was denied December 12, 1932 (R. 48). The filing of this petition stayed all proceedings under the judgment as to both Missouri State Life Insurance Company, the defendant, and the Hartford Accident & Indemnity Company, the surety on the supersedeas bond. Section 2171 of Crawford & Moses' Digest of the Statutes of Arkansas, among other things, provides that no mandate shall issue and that no decision of the Supreme Court of Arkansas shall "become final until after fifteen judicial days from the time the decision was rendered unless the court, for good cause shown, shall otherwise direct. If a petition for rehearing be filed before the time for the decision to become final as above specified, all proceedings upon the decision and mandate therein shall be suspended until said petition for rehearing shall be acted upon by the court. * * *"

Thereafter, upon application seasonably made, on March 10, 1933, by petitioners to Associate Justice Butler

of this Honorable Court, an order was signed by the said Justice extending the time within which petitioners could apply for a writ of certiorari in this cause for a period of thirty days from said March 10, 1933.

The jurisdiction of this court is invoked under Section 344, Title 28, United States Code Annotated (Section 237, Judicial Code).

QUESTION PRESENTED

The question in this case is whether an attorney's fee for the plaintiff imposed by a State statute should be considered in determining the amount in controversy essential to a removal to the Federal Court. The court below has decided that Federal question in a way probably not in accord with applicable decisions of this court.

STATUTE INVOLVED

Section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas is set forth in the subdivision next following.

STATEMENT OF FACTS

Respondent, a citizen of Arkansas, brought suit against petitioner, Missouri State Life Insurance Company, a Missouri corporation, on an accident policy for $1,000, and a life policy for $2,000, making a total of $3,000 (R. 4-8).

Section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas provides:

> "In all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor, shall fail to pay the same within the time specified in

> the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent damages upon the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of said loss; said attorney's fee to be taxed by the court where the same is heard on original action, by appeal or otherwise and to be taxed up as a part of the costs therein and collected as other costs are or may be by law collected. Act March 29, 1905, p. 307."

To avoid a removal, the respondent waived the twelve per cent penalty, but insisted on the attorney's fee (R. 9, 10).

After due notice, petitioner filed a petition for removal on the ground of diversity of citizenship, alleging that the lowest reasonable attorney's fee would be $250, that such fee was not costs within the meaning of the removal act, and that the amount in controversy was therefore in excess of $3,000 (R. 10-13). A bond in due form was filed (R. 13-15).

The trial court denied the petition for removal and awarded an attorney's fee of $550, which was taxed as costs (R. 15-16). This judgment was affirmed by the Supreme Court of Arkansas, and a joint judgment was entered against the Missouri State Life Insurance Company and the Hartford Accident & Indemnity Company, the latter being surety on the supersedeas bond (R. 41). Both of these parties are petitioners herein.

ARGUMENT AND AUTHORITIES

It seems to us that this question is settled by the decision of this court in *People of Sioux County, Nebraska,* v. *National Surety Company,* 276 U. S. 238, where it was held:

> "The attorney's fees which are directed by Sec. 7811, Nebraska Comp. Stats., 1922, to be allowed and 'taxed as a part of the costs,' in actions on guaranty and other specified insurance contracts, are not costs in the ordinary sense and are not taxable as costs under Rev. Stats., Secs. 823, 824, in actions in Federal courts, but are to be allowed in those courts by inclusion in their judgments. P. 242."

We submit that there is no magic power in the formula, "to be taxed as costs," that would change what is intended as a penalty for resisting a just demand into something else. In *Fidelity Mutual Life Ass'n* v. *Mettler,* 185 U. S. 308, and *Home Life Insurance Co.* v. *Fisher,* 188 U. S. 726, the statute imposing the attorney's fee did not provide that it should be taxed as costs. In *People of Sioux County, Nebraska,* v. *National Surety Company,* 276 U. S. 238, that formula was used, but this court held that it made no difference. On page 242, the court said:

> "The present statute, printed in the margin, provides that in the cases specified the court 'shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as a part of the costs.' The direction that the added liability be included in the judgment as costs does no more in substance than the provision upheld and applied in the Mettler case, that the insurance company 'shall be liable to pay * * * all reasonable attorney's

fees,' or the provision upheld and applied in *Home Life Insurance Co.* v. *Fisher, supra,* that the attorney's fees should be added to the judgment."

On the same page the court says:

"In these cases the local statutes were, in effect, treated as creating a statutory liability in which insurers, *by accepting risks after their enactment had acquiesced,* and for the liability thus assumed a remedy was available in the Federal as well as in the State courts. *Fidelity Mutual Life Ass'n* v. *Mettler, supra,* at 326."

The law enters into and forms a part of all contracts, and the provision for attorney's fees has largely been sustained upon the ground that a foreign corporation on entering a State accepts its laws.

This is further emphasized on page 243, where we find this statement:

"Whether this liability for an attorney's fee, *assumed by entering into an insurance contract after the enactment of the statute providing for the liability,* may be enforced in the Federal courts does not depend on any nice distinctions which may be taken between the right created and the remedy given. Disregarding mere matters of form it is clear that it is the policy of the State to allow plaintiffs to recover an attorney's fee in certain cases, and it has made that policy effective by making the allowance of the fee mandatory on its courts in those cases."

In *American Liberty Insurance Company* v. *Washington,* 183 Ark. 497, the Supreme Court of Arkansas, in speak-

ing of this statute, said: "The statute became a part of the contract of insurance."

In *People of Sioux County* v. *National Surety Company, supra,* the distinction between "costs" in the sense in which that word is used in the removal acts, and attorney's fees allowed the plaintiff, is clearly expressed at page 243:

> "That the statute directs the allowance, which is made to plaintiff, to be added to the judgment as costs are added does not make it *costs* in the ordinary sense of the traditional, arbitrary and small fees of court officers, attorneys's docket fees and the like, allowed to counsel by R. S. Secs. 823, 824.
>
> "The present allowance, since it is not costs in the ordinary sense, is not within the field of costs legislation covered by R. S. Secs. 823, 824. That the particular mode of enforcing the right provided by the state statute—*i. e.,* by taxing the allowance as costs—is not available to the Federal courts under R. S. 823, 824, does not preclude the recovery."

We submit that merely calling a penalty "costs" does not change its nature.

That the attorney's fee is a penalty for an improper defense has been decided by this Court and by the Supreme Court of Arkansas.

In the case of *Vaughan* v. *Humphreys,* 153 Ark. 140, the court said:

> "The attorney's fee is a penalty given to reimburse the policy-holder for expenses incurred in enforcing the contract of indebtedness, and is taxed as

costs in the case. *Arkansas Ins. Co.* v. *McManus*, 86 Ark. 115, and *Mutual Life Ins. Co.* v. *Owen*, 111 Ark. 554. 'Hence the attorney's fee is part of the recovery of the policy-holder against the insurance company.'' In *C. & N. W. Ry.* v. *Nye*, 260 U. S. 43, this court says:

"'* * * that the reasonable payment of just claims against them for faulty performance of their functions is a part of their duty, and that a reasonable penalty may be imposed on them for failure promptly to consider and pay such claims, in order to discourage delays by them. *This penalty or stimulus may be in the form of attorney's fees.*''

In *Kansas City Southern Ry. Co.* v. *Marx*, 72 Ark. 357, 359, it is said:

"Statutes allowing attorney's fees to be taxed against railway companies where judgments are recovered against them for the violation of statutory regulations are upheld on the ground that *such a fee is in the nature of a penalty* imposed upon the company for failure to comply with the police regulations of the state.''

In *St. Louis-Southwestern Ry. Co.* v. *Knight*, 81 Ark. 431, it is said:

"In *Kansas City So. Ry. Co.* v. *Marx*, 72 Ark. 357, we said that the Legislature could not discriminate against railroad companies and tax them with attorney's fees when other litigants were not subjected to such liabilities, but that they could authorize them to be taxed with attorney's fees in judgment against them for violating statutory regulations, *the fee in such a case being a part of the penalty* for violating the statute.''

We cannot find that this question of removability has ever been before any of the Circuit Courts of Appeal, but in *Business Men's Assurance Co.* v. *Campbell,* 18 Fed. (2d) 225, in speaking of a similar statute of Nebraska, the Circuit Court of Appeals for the Eighth Circuit says:

> "It is beyond question that this act was not intended to make such allowances ordinary costs as are fees of court officers or attorney's docket fees."

The Supreme Court of Arkansas concedes that if the attorney's fee is a penalty it must be added to the face of the policy to determine removability. In *Mutual Life Insurance Co.* v. *Marsh,* 185 Ark. 332, the court holds:

> "The amount in controversy in an action on an insurance policy for $3,000 plus 12 per cent. penalty is $3,360, which entitled the defendant, a nonresident, to removal of the cause to the Federal Court, under tit. 28, Sec. 71, U. S. C. A."

We find that four district judges have passed on the question whether attorney's fees should be considered in determining the amount for removal. The cases are equally divided, but they were all before the decision in *People of Sioux County, Nebraska,* v. *National Surety Co.,* 276 U. S. 238.

Rogers v. *Riley,* 80 Fed. 759.

Swofford v. *Cornucopia Mines,* 140 Fed. 957.

Peters v. *Queen Insurance Co.,* 182 Fed. 113.

Connor v. *Connecticut Fire Ins. Co.,* 292 Fed. 767.

The jurisdiction of courts of the United States, whether in original suits or upon removal, has always depended upon the amount in controversy, "exclusive of costs." It

was so in the Judiciary Act of 1789, and the same language appears in each re-enactment thereof. The costs there referred to are defined in *People of Sioux County* v. *National Surety Co.*, 276 U. S. 238, 243, as "the traditional, arbitrary and small fees of court officers, attorney's docket fees and the like, allowed to counsel by R. S. Secs. 823, 824." If "costs" are thus defined in the present Judiciary Act; the word must have had that significance in all the judiciary acts preceding.

This court takes judicial notice of the laws of all the states, and it knows that these state statutes allowing attorney's fees against corporations as a penalty for delay in paying claims are of comparatively modern origin. No such acts were in existence when the word "costs" was first used in defining federal jurisdiction, and such statutes could not have been in the mind of Congress when it excluded costs from the amount involved.

REASONS FOR GRANTING WRIT

The Supreme Court of Arkansas has decided this important question, pertaining to the right to remove cases to the Federal Courts, in a way probably in conflict with applicable decisions of this Court.

WHEREFORE, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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of Little Rock, Arkansas,
Paul B. Cromelin,
Bolitha J. Laws,
of Washington, D. C.,
Counsel for Petitioners.

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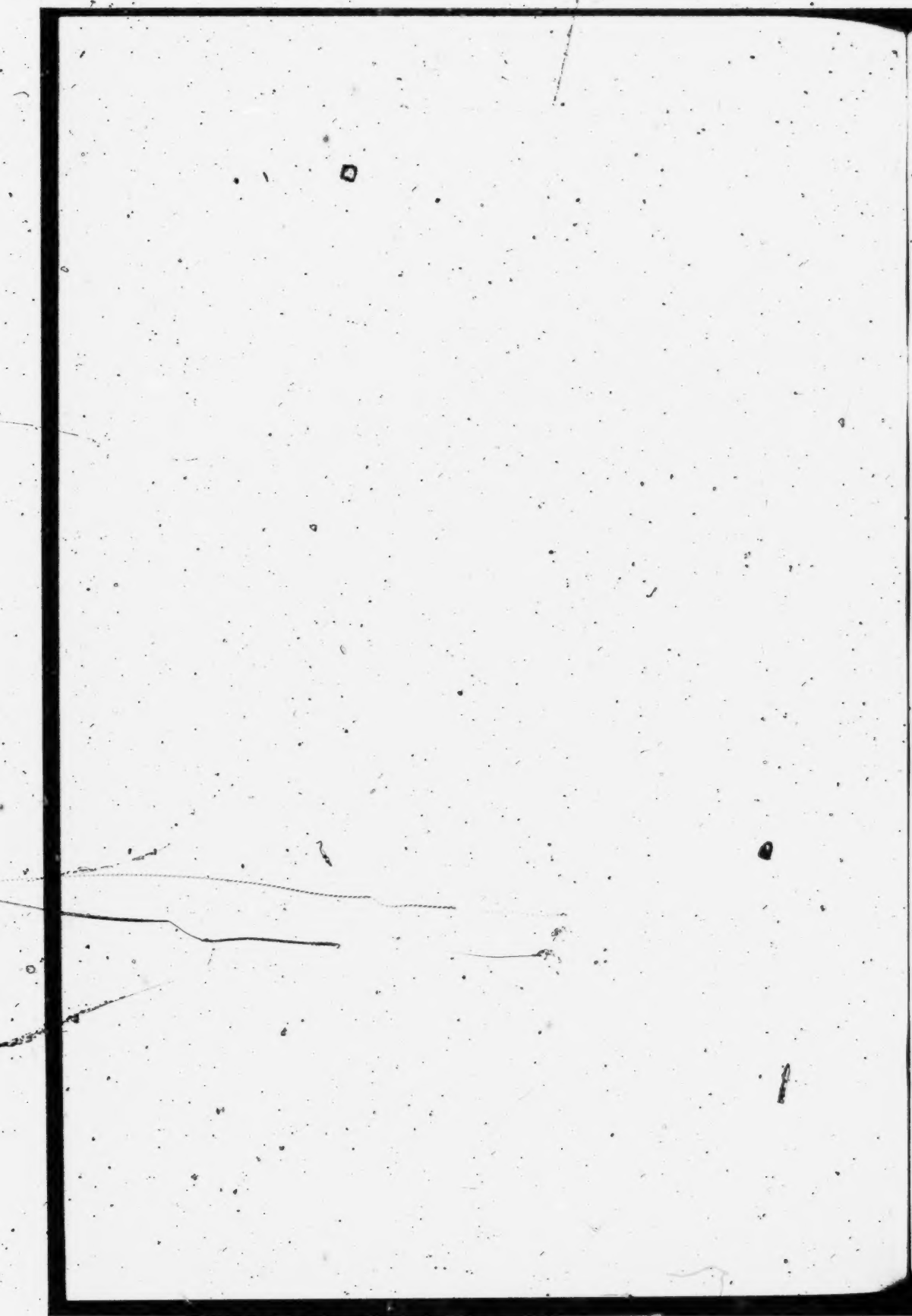
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Supreme Court of the United States

OCTOBER TERM, 1933

No. 16

MISSOURI STATE LIFE INSURANCE COMPANY AND HARTFORD ACCIDENT & INDEMNITY CO. ..... *Petitioners,*

v.

MARION JOHNSON ..... *Respondent.*

BRIEF FOR PETITIONERS

REFERENCE TO OFFICIAL REPORT OF OPINION DELIVERED BY THE LOWER COURT

The opinion of the Supreme Court of Arkansas in the case of *Missouri State Life Insurance Company* v. *Johnson* is reported in 186 Ark. 519, 54 S. W. (2) 407.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Arkansas was entered on November 14, 1932 (R. 41). A season-

ably filed petition for rehearing in said court was denied on December 12, 1932 (R. 48). The filing of this petition stayed all proceedings under the judgment as to both Missouri State Life Insurance Company, the defendant, and Hartford Accident & Indemnity Company, the surety on the supersedeas bond. Section 2171 of Crawford & Moses' Digest of the Statutes of Arkansas, among other things, provides that no mandate shall issue and that no decision of the Supreme Court of Arkansas shall "become final until after fifteen judicial days from the time the decision was rendered, unless the court, for good cause shown, shall otherwise direct. If a petition for rehearing be filed before the time for the decision to become final, as above specified, all proceedings upon the decision and mandate therein shall be suspended until petition for rehearing shall be acted upon by the court."

Thereafter, upon application seasonably made on March 10, 1931, by petitioners to Associate Justice Butler of this Honorable Court, an order was signed by the said justice extending the time within which petitioners could apply for a writ of certiorari in this cause for a period of thirty days from said March 10, 1933.

The jurisdiction of this court is invoked under Section 344, Title 28, U. S. Code Annotated (Sec. 237 Judicial Code). On May 8, 1933, this Honorable Court granted a writ of certiorari to review the judgment of the Supreme Court of Arkansas.

STATEMENT OF CASE

The question in this case is whether an attorney's fee for the plaintiff imposed by state statute should be considered in determining the amount in controversy sufficient to sustain jurisdiction on removal to a federal court.

Section 6155 of Crawford & Moses' Digest provides:

> "In all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor, shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent. damages upon the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of said loss; said attorneys' fee to be taxed by the court where the same is heard on original action, by appeal or otherwise and to be taxed up as a part of the costs therein and collected as other costs are or may be by law collected. Act March 29, 1905, p. 307."

Respondent, a citizen of Arkansas, brought suit against petitioner, a Missouri corporation, on an accident policy for one thousand dollars ($1,000) and a life policy for two thousand dollars ($2,000), making a total of three thousand dollars ($3,000). To avoid removal, the respondent waived the twelve per cent penalty, as prescribed by the statute, but insisted on the attorney's fee (R. 9, 10).

After due notice, petitioner, Missouri State Life Insurance Company, filed a petition for removal on the ground of diversity of citizenship, alleging that a reasonable attorney's fee would not be less than two hundred and fifty dollars ($250), and that such fee was not costs within the meaning of the Removal Act and that the amount in controversy was therefore in excess of three thousand dollars ($3,000) (R. 10-13). A bond in due form was filed (R. 13-15). The trial court denied the petition for removal (R. 15, 16), and awarded an attorney's fee of five hundred and fifty dollars ($550), which was taxed as costs (R. 35). This judgment was affirmed by the Supreme Court of Arkansas and a joint judgment was entered against the petitioners (R. 41).

SPECIFICATIONS OF ERRORS

The lower court erred in holding that a controversy involving three thousand dollars ($3,000) and a reasonable attorney's fee of not less than two hundred and fifty dollars ($250) was not removable to the federal court.

ARGUMENT

The original jurisdiction of the district courts of the United States is defined by Section 24 of the Judicial Code as follows:

> "The District Courts shall have original jurisdiction as follows:
>
> "First. Of all suits of a civil nature at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars ($3,000), and * * * (b) is between citizens of different states. * * *."

Jurisdiction of the United States district courts on removal is defined in Section 28 of the Judicial Code as follows:

> "Any suit of a civil nature at law or in equity arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought in any state court, may be removed by the defendant or the defendants therein to the district court of the United States for the proper district."

The question presented here turns upon the meaning of the word "costs" as used in the clause "where the matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000)." It seems to us that the question has already been answered by this court in the case of *People*

of Sioux County, Nebraska, v. *National Surety Company,* 276 U. S. 238. In that case the respondent had executed a bond in the amount of $30,000 to protect deposits made by Sioux County in the First National Bank of Harrison. The bank became insolvent, and at the time it closed its doors it held county deposits amounting to $35,395.70. Suit was instituted in the state court to recover the penal amount of the bond and a reasonable attorney's fee. The proceeding was removed to the United States District Court, by reason of the amount involved and diversity of citizenship. The district court rendered judgment for the full amount of the bond and assessed an attorney's fee of $3,000. The Circuit Court of Appeals, Eighth Circuit, reversed the judgment allowing the attorney's fee, and limited recovery on the bond to $25,000. The theory prompting this reduction was that the statute of Nebraska operated to limit the liability of the surety to one-half of the authorized capital stock of the bank which acted as depository. Before the proceeding reached this court, the construction of the Nebraska statute had been settled by a decision of the supreme court of that state. Following that decision, this court held that Sioux County was entitled to recover the full amount of the bond. The Circuit Court of Appeals had disallowed the attorney's fee because the state statute authorizing the allowance provided that it should be taxed as costs, and that such statute could be applied only in the state courts, because under the provisions of the Revised Statutes (823, 824) such an al-

lowance could not be taxed as costs. In holding that this theory was erroneous, this court said:

> "In striking down so much of the judgment as allowed an attorney's fee the court below was persuaded that Sec. 7811, which provides for an attorney's fee, authorized it only as costs to be taxed in the state court. As costs in the federal courts are regulated exclusively by R. S. Secs. 823 and 824, the court concluded that other costs, authorized only by a state statute, could not be included in the judgment. See *United States* v. *Sanborn*, 135 U. S. 271, 282; *The Baltimore*, 8 Wall. 377, 388, *et seq.*; compare *Ex Parte Peterson*, 253 U. S. 300, 314-319.
>
> "Both in an earlier case, *Globe Indemnity Co.* v. *Sulpho-Saline Bath Co.*, 299 Fed. 219, certiorari denied 266 U. S. 606; see also *Spring Garden Insurance Co.* v. *Amusement Syndicate Co.*, 178 Fed. 519, and in a later case, *Business Men's Assurance Co.* v. *Campbell*, 18 Fed. (2d) 223, the same court applied the Nebraska statute allowing the recovery of attorneys' fees in suits upon insurance policies. When it was argued that no other costs can be taxed in a court of the United States than those authorized by federal statute, the Court of Appeals said in the latter case (p. 224) that the objection 'applies only to ordinary costs, and not to allowances for attorneys' services provided by state statutes.'
>
> "State statutes allowing the recovery of attorneys' fees in special classes of actions have been upheld as constitutional by this court, *Farmers' & Merchants' Insurance Co.* v. *Dobney*, 189 U. S. 301; *Missouri, Kansas & Texas Ry.* v. *Harris*, 234 U. S. 412; *Chicago & Northwestern Ry.* v. *Nye Schneider Fowler Co.*, 260 U. S. 35; *Fidelity*

Mutual Life Ass'n v. *Mettler,* 185 U. S. 308, and they have been given effect in suits brought in the federal courts. *Fidelity Mutual Life Ass'n* v. *Mettler, supra; Iowa Life Insurance Co.* v. *Lewis,* 187 U. S. 335; *Home Life Insurance Co.* v. *Fisher,* 188 U. S. 726; *Hartford Fire Insurance Co.* v. *Wilson & Tcomer Fertilizer Co.,* 4 Fed. (2d) 835, certiorari denied 268 U. S. 704.

"In these cases the local statutes were in effect treated as creating a statutory liability in which insurers, by accepting risks after their enactment, had acquiesced, and for the liability thus assumed a remedy was available in the federal as well as in the state courts. *Fidelity Mutual Life Ass'n* v. *Mettler, supra,* at 326.

"The present statute, printed in the margin, provides that in the cases specified the court 'shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as a part of the costs.' The direction that the added liability be included in the judgment as costs does no more in substance than the provision upheld and applied in the *Mettler* case, that the insurance company 'shall be liable to pay * * * all reasonable attorney's fees' or the provision upheld and applied in *Home Life Insurance Co.* v. *Fisher, supra,* that the attorneys' fees should be added to the judgment.

"Such doubt as there may be as to the meaning and effect of the statute arises from certain decisions of the Supreme Court of Nebraska enforcing it in suits upon insurance contracts entered into before its enactment, in which the statute, attacked as impairing the obligation of the contract, was characterized as 'remedial' or as a 'costs' statute. *Nye-Schneider-Fowler Co.* v. *Bridges,*

Hoye & Co., 98 Neb. 27; Id., 863; *Ward* v. *Bankers' Life Co.*, 99 Neb. 812; *Reed* v. *American Boulding Co.*, 102 Neb. 113. In *Nye-Schneider-Fowler Co.* v. *Bridges, Hoye & Co., supra,* the Supreme Court of Nebraska said (p. 867):

"'If the question that we are considering was now presented for the first time, we would hesitate to say that this statute does not create and add to the contract a legal liability which would not exist under the contract prior to the enactment of this statute. The fact that the attorney's fee is to be taxed as costs in the case is not of itself decisive of the question.'

"But the question before the Nebraska court in the cases cited was not that with which we are now concerned. Whether this liability for an attorney's fee, assumed by entering into an insurance contract after the enactment of the statute providing for the liability, may be enforced in the federal courts does not depend on any nice distinctions which may be taken between the right created and the remedy given. Disregarding mere matters of form it is clear that it is the policy of the state to allow plaintiffs to recover an attorney's fee in certain cases, and it has made that policy effective by making the allowance of the fee mandatory on its courts in those cases. It would be at least anomalous if this policy could be thwarted and the right so plainly given destroyed by removal of the cause to the federal courts.

"That the statute directs the allowance, which is made to plaintiff, to be added to the judgment as costs are added does not make it costs in the ordinary sense of the traditional, arbitrary and small fees of court officers, attorneys' docket fees and the like, allowed to counsel by R. S. Secs. 823, 824.

> "The present allowance, since it is not costs in the ordinary sense, is not within the field of costs legislation covered by R. S. Secs. 823, 824. That the particular mode of enforcing the right provided by the state statute, *i.e.*, by taxing the allowance as costs—is not available to the federal courts under R. S. Secs. 823, 824 does not preclude the recovery. Since the right exists the federal courts may follow their own appropriate procedure for its enforcement by including the amount of the fee in the judgment. R. S. Sec. 914. Compare *Mexican Central Ry.* v. *Pinkney*, 149 U. S. 194; *Indianapolis & St. Louis R. R.* v. *Horst*, 93 U. S. 291; *Manitowoc Malting Co.* v. *Feuchtwanger*, 196 Fed. 506; *Boatmen's Bank* v. *Trower Bros. Co.*, 181 Fed. 804."

The language of the Nebraska statute which was quoted in the margin is substantially the same as that contained in Section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas. Both provide that the attorney's fee which is allowed by the court shall be "taxed as costs."

In referring to the cases where the constitutionality of attorney's fee statutes had been upheld, this court said:

> "In these cases the local statutes were in effect treated as creating a statutory liability in which insurers, by accepting risks after their enactment, had acquiesced."

Such is the construction given Section 6155 of Crawford & Moses' Digest by the Supreme Court of Arkansas. In the case of *Vaughan* v. *Humphreys*, 153 Ark. 140, 239 S. W. 730, the court said:

"The attorney's fee is a penalty given to reimburse the policyholder for expenses incurred in enforcing the contract of indebtedness, and is taxed as costs in the case. *Arkansas Ins. Co.* v. *McManus,* 86 Ark. 115, and *Mutual Life Ins. Co.* v. *Owen;* 111 Ark. 554. Hence the attorney's fee is part of the recovery of the policyholder against the insurance company."

In *American Liberty Mutual Insurance Company* v. *Washington,* 183 Ark. 497, 36 S. W. (2d) 963, in speaking of this statute, the court said:

"The statute becomes a part of the contract of insurance."

There are Arkansas statutes which authorize the assessment of attorneys' fees in certain proceedings against railroad companies where police regulations have been violated. In *Kansas City Southern Railway Company* v. *Marx,* 72 Ark. 357, 80 S. W. 579, we find this statement:

"Statutes allowing attorney's fees to be taxed against railway companies where judgments are recovered against them for the violation of statutory regulations are upheld on the ground that *such a fee is in the nature of a penalty* imposed upon the company for failure to comply with the police regulations of the state."

In *St. Louis-Southwestern Railway Company* v. *Knight,* 81 Ark. 429, 99 S. W. 684, the court said:

"In *Kansas City So. Ry. Co.* v. *Marx,* 72 Ark. 357, we said that the Legislature could not discriminate against railroad companies and tax them with attorney's fees when other litigants were not

subjected to such liabilities, but that they could authorize them to be taxed with attorney's fees in judgment against them for violating statutory regulations, *the fee in such a case being a part of the penalty* for violating the statute."

Section 6155 of Crawford & Moses' Digest is to be applied in all cases. In an equitable proceeding resulting in a judgment against an insurer on a policy, the lower court declined to assess an attorney's fee. On appeal, the Supreme court in its opinion, in the case of *Bankers' Reserve Life* v. *Crowley,* 171 Ark. 135, 284 S. W. 4, said:

"Upon the cross-appeal we think the chancellor was wrong in not allowing twelve per cent. damages, together with a reasonable attorney's fee for the prosecution and collection of the loss, as provided in Sec. 6155 of Crawford & Moses' Digest. It is true, as held in *Federal Union Surety Co.* v. *Flemister,* 95 Ark. 389, that no recovery could be had under this statute in the application of the general rule that a chancery court will not enforce penalties except under very peculiar circumstances, which were not presented in that case. There a suit was instituted in behalf of policyholders for the appointment of an ancillary receiver to take charge of the assets of an insurance company in this State, on the ground that a general receiver had been appointed in the State of Nebraska to take charge of the assets of the company and to wind up its affairs on the ground of insolvency. All parties having claims voluntarily submitted themselves to the jurisdiction of the chancery court, and the liability of the Federal Union Surety Company as surety on the bond of the insurance company was treated by the parties

and by the chancery court as an asset of the insurance company in this State. There the main purpose of the suit was the appointment of the ancillary receiver to aid in winding up the affairs of the insurance company in the chancery court, and the filing of the claims was but an incident to the main suit.

"In the case at bar the suit was commenced in equity by the insurance company to cancel a policy of life insurance after the death of the insured on the ground of fraudulent misrepresentation on the part of the insured in the procurement of the insurance, and a cross-bill was filed by the administrator of the estate of the deceased policyholder to recover the amount of the insurance provided in the policy. There was a recovery for the full amount of the policy.

"The twelve per cent. allowed by the statute is given as damages for failure to comply with the contract of payment, and the attorney's fee is allowed as compensation for the cost of collecting the debt. *Mutual Life Ins. Co.* v. *Owen*, 111 Ark. 554.

"It is settled by our previous cases that contracts of insurance, from their very nature, are susceptible of classification apart from other contracts, and, under ordinary circumstances, the damages and attorney's fees are as collectible in a chancery court as in any other court."

In the case of *Mutual Life Insurance Company* v. *Marsh*, 185 Ark. 332, 47 S. W. (2d) 585, the Supreme Court of Arkansas held that a claim of $3,000 plus the 12 per cent. penalty which is provided for by Section 6155 of Crawford & Moses' Digest, is a controversy which is removable. This is from the opinion:

> "The amount in controversy in an action on an insurance policy for $3,000 plus 12 per cent. penalty is $3,360, which entitled the defendant, a nonresident, to removal of the cause to the Federal Court, under tit. 28, Sec. 71, USCA."

We can see no magic in the formula "to be taxed as costs" which can change what is clearly a penalty into something else. In the petition for removal it was alleged that a reasonable attorney's fee on a recovery of $3,000 would be at least $250 (R. 11). In fact, the trial court assessed a fee of $550 (R. 35). The Supreme Court of Arkansas has held that ordinarily a fee of ten per cent. is appropriate, but where there are exceptional difficulties an allowance of fifteen per cent. is proper. The following quotation is taken from the case of *Missouri State Life* v. *Fodrea,* 185 Ark. 155, 46 S. W. (2d) 638:

> "The rule has been to allow about 10 per cent. of the amount of the recovery, but here there appears to have been considerable work done in the preparation and trial of the cases and we have reached the conclusion that 15 per cent. of the recovery, or $300 in each case, will be reasonable compensation."

We are less concerned with the meaning of the Arkansas statute than we are with the meaning of the clause "where the matter in controversy exceeds $3,000, exclusive of interest and costs" as used in Section 24 of the Judicial Code. It seems to us that the word "costs" was used in its ordinary sense, and that Congress intended to fix a definite test for determining

removability. It is hardly possible that the word was used as a variable, to mean one thing in one case and something else in another. It is hardly possible that Congress could ever have intended to let removability rest upon a mere definition as given by a state statute to a substantial part of the claim. In *Sioux County* v. *National Surety Company, supra,* this court said:

> "That the statute directs the allowance, which is made to plaintiff, to be added to the judgment as costs are added does not make it costs in the ordinary sense of the traditional, arbitrary and small fees of court officers, attorneys' docket fees, and the like, allowed to counsel by R. S., paragraphs 823 and 824. The present allowance, since it is not costs in the ordinary sense, is not within the field of costs legislation covered by R. S., Secs. 823, 824."

If a substantial attorney's fee allowed under a state statute is not "costs" in the ordinary sense, as the word is used in the Revised Statutes, then why should it be called "costs" under the removal act? The word "costs" wherever used in Federal legislation has meant costs in the ordinary sense, such as the traditional, arbitrary and small fees of officers, attorneys' docket fees, and the like. Section 968 of the Revised Statutes povides that a plaintiff recovering less than $500 may be adjudged to pay the "costs." Section 969 of the Revised Statutes provides that in certain cases the United States, in internal revenue suits, shall not be subject to "any costs." Section 970 of the Revised Statutes provides that in certain instances claim-

ants of any property seized by the United States shall not be entitled to "costs." Under Section 971 of the Revised Statutes the plaintiff, if non-suited in certain proceedings, shall be liable for "double costs." Section 972 of the Revised Statutes provides that in copyright suits "full costs" shall be allowed. Section 974 of the Revised Statutes provides that in prosecution for fine or forfeiture the defendant shall be "subject to the payment of costs." Section 975 of the Revised Statutes provides that in certain proceedings under penal statutes the court shall "award the defendant his costs." Section 977 of the Revised Statutes provides that where an action is unnecessarily divided into several actions, the party shall not "recover the costs of more than one action or process." Section 982 of the Revised Statutes provides that if an attorney appears to have multiplied the proceedings he shall be "required to satisfy any excess of costs so increased." Section 983 of the Revised Statutes provides that the fees of the clerk, marshal, attorneys, printers, witnesses and lawful fees for exemplifications of papers used at the trial, where "costs" are recovered by the prevailing party, shall be taxed by the clerk or judge in his favor. Nowhere is the word "costs" used in these provisions as covering a substantial allowance to an attorney which is part of the recovery. It is quite obvious that the word "costs," as used in Section 24 of the Judicial Code (R. S. 563, 629) was used in the same sense that the word was employed in other sections of the Revised Statutes, meaning the "traditional, arbitrary and small fees of court officers, attorneys' docket fees" and the like.

This court takes judicial notice of the laws of all the states, and it knows that these state statutes allowing attorneys' fees against corporations as a penalty for delay in paying claims are of comparatively modern origin. No such acts were in existence when the word "costs" was first used in defining federal jurisdiction, and such statutes and the substantial allowances thereunder could not have been in the mind of Congress when it excluded "costs" from the amount involved.

The case of *Swofford* v. *Cornucopia Mines of Oregon,* Circuit Court, Oregon, 140 Fed. 957, decided in 1905, holds that an attorney's fee cannot be included in making up the jurisdictional amount for removal. On a motion to remand the court said:

> "The complaint is brought to enforce a miner's lien under section 5668, B. & C. Comp. Or. The plaintiff alleges that he has perfected two such liens for work done upon the Cornucopia Mines of Oregon, the aggregate of which is $1,905.50. He claims in addition thereto attorney's fees in the amount of $750 under section 5672, B. & C. Comp. Or., which contains the following provision:
>
> " 'In all suits under this act the court shall, upon entering judgment for the plaintiff, allow as part of the costs all moneys paid for the filing and recording of the lien and also a reasonable amount as attorney's fees.'
>
> "The question presented is whether the attorney's fee so provided for as costs may be added to the amount of the liens, so as to create the amount in controversy which is necessary to give this court jurisdiction. The defendants cite and

rely upon *Rogers* v. *Riley,* (C. C.) 80 Fed. 759, in which it was held that where by express stipulation, valid in the state where made, a debtor becomes liable for reasonable attorney's fees in case the debt is collected by suit, such fee is not a part of the costs which are excluded under the judiciary act, but may be added to the amount of the debt for the purpose of making up the jurisdictional amount. This was held expressly upon the ground that the obligation to pay a reasonable attorney's fee was a contractual one, and was an existing liability at the date of bringing the suit. But in the present case there was no such contractual liability to pay attorney's fees. The corporation for which the work was done had not promised to pay attorney's fees. The obligation is purely statutory, and is declared by the statute to be allowable upon entering a judgment for the lien claimant as a part of the costs. In 11 Cyc. 105, it is said:

"'In jurisdictions where stipulations for the payment of attorney's fees are considered valid, these fees are taxable as costs.'

"This is especially true in jurisdictions where by statute it is declared that attorney's fees shall be treated as part of the costs, notwithstanding that the obligation to pay them may rest in the contract of the parties. *Spiesberger Bros.* v. *Thomas,* 59 Iowa 606, 13 N. W. 745. The amount in controversy in the present suit is therefore the sum of the liens, exclusive of attorney's fees, and is not sufficient to sustain the jurisdiction of the court."

Likewise, *Peters* v. *Queen Insurance Company of America,* Circuit Court of Georgia, 182 Fed. 113, decided in 1910, is opposed to the contention that an at-

torney's fee is to be considered in determining the amount in controversy. In remanding the case to the state court, the district judge said:

> "The jurisdiction of this court does not obtain in any case of this character, unless the amount involved exceeds the sum of $2,000, exclusive of interest and costs. Plaintiff's claim is made up of three items: (1) Loss under the policy in the amount of $1,500; (2) 25 per cent. thereon, amounting to $375, as a penalty under section 2140 of the Civil Code of Georgia of 1895; and (3) 25 per cent. thereof as attorney's fees, amounting also to $375, under the same section of the Code.
>
> "A motion to remand the case has been made, was argued orally and by brief, and the court has taken time for advisement. It is quite evident that, in order to confer jurisdiction, both the penalty and the attorney's fees claimed must be considered as included in the amount in controversy. If either item is omitted, the plaintiff's claim is only for $1,875.
>
> "Section 2140 of the Code of Georgia of 1895 provides:
>
> " 'The several insurance companies of this state, and foreign insurance companies doing business in this state, in all cases when a loss occurs, and they refuse to pay the same within sixty days after a demand shall have been made by the holder of the policy on which said loss occurred, shall be liable to pay the holder of said policy, in addition to the loss, not more than 25 per cent. on the liability of said company for said loss; also, all reasonable attorney's fees for the prosecution of the case against said company, provided it shall be made to appear to the jury trying the same that the

refusal of the company to pay said loss was in bad faith.'

"It is not deemed essential to state the views of the court upon the question whether or not the penalty made possible by the statute is a part of the principal amount involved. It seems the question may be determined upon the inquiry: Does the language of the Code allowing reasonable attorney's fees in the section above quoted, viz., 'all reasonable attorney's fees for the prosecution of the case,' provide for the recovery of such amount as costs or damages?

"It is insisted that, since costs were unknown to the common law, only such items as are defined by the statute of the state (section 5394 of the Civil Code of 1895) should be regarded as costs. This section relates exclusively to the costs of witnesses, of the clerk of court, of the justice of the peace, the sheriff, etc., and has no express reference to fees of attorneys. It is, however, true that the word 'costs' has been judicially defined by the Supreme Court of the state as follows:

"'The term "costs" has, as applied to proceedings in a court of justice, as in the acceptation of the profession and by the practice of all courts in Georgia, a well-understood meaning. It includes all charges fixed by statute, as compensation for services rendered by officers of the court in the progress of the cause. It does not embrace fees, to which counsel prosecuting or defending may be entitled by contract, express or implied, between them and their clients.' *Davis* v. *State*, 33 Ga. 533; *Markham* v. *Ross*, 73 Ga. 105.

"Accepting these deliverances of the state Supreme Court as conclusive, it appears that fees

of counsel for their services under contract, express or implied, may not be treated as costs; and, since this item of attorney's fees does not arise from contract, express or implied, but is allowed by statute, the inquiry seems inevitable, must it not be treated as costs? It is true that the amount is not definitely fixed by the statute, and the jury is permitted to fix it. It must be 'reasonable,' and is therefore under the control of the court. It is not a certain item of costs, but '*id certum est quod certum reddi potest.*' And since the amount claimed is not for the honorarium of counsel, it is for the reasonable fees of attorneys, and, like the docket fee of the attorney allowed by the practice of the United States court, the finding of the jury in this respect, if allowable at all, it would seem just be treated as costs."

A different conclusion is reached in the later case of *Conner* v. *Connecticut Fire Insurance Company*, District Court of Florida, 292 Fed. 767, decided 1923. The statute involved did not provide that the attorney's fee should be taxed as costs. The district judge called attention to this distinction, and then said:

"The statute of Florida provides that there shall be adjudged against the insurer, and in favor of the insured, a reasonable sum as fees for his attorney prosecuting the suit, and further provides for the fixing of this sum by the court or jury upon testimony. Such being the statute of this state, I must view the attorney's fee provided by the statute as a penalty, and not as costs, to be taxed at the termination of the case, and, being a penalty, it may be considered in arriving at the jurisdictional amount in controversy in the case."

The case of *Rogers* v. *Riley*, 80 Fed. 759, involved a note for $2,000, with a provision for the payment of an attorney's fee as an expense of collection. In holding that such fee should be included as part of the amount in controversy, the court said:

> "And it is alleged in the bill that 10 per cent. on the amount sued by the mortgagee would be a reasonable attorney's fee in the case, and the prayer of the bill is that a sale of said property be made to pay said mortgage debt, together with 10 per cent. thereon, as complainant's attorney's fee. The act of 1887-88 gives this court 'concurrent jurisdiction with the several courts of suits of a civil nature at common law and equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000'; and the inquiry here is whether or not this attorney's fee which is thus contracted for in this mortgage is to be considered as costs, within the meaning of the act, or should it be calculated as a liability, in estimating the amount in controversy? The acts of Congress allow an attorney's fee, which in a case like this is $20, and provide, also, that the fees of the clerk, marshal, and attorney shall be taxed by the judge or the clerk of the court, and be included in, and recorded as part of, the judgment or decree against the losing party. See Rev. St. Sections 824, 983. This, being a contractual obligation to pay the association a reasonable attorney's fee, is not, we think, in any sense, costs, as mentioned in the act of 1887-88, but is a liability which should be included in estimating the amount in controversy."

As pointed out in the above quotation, the only attorney's fee which could come within the definition of

"costs" as used in the act conferring jurisdiction on the district courts, are such fees as may be allowed under Revised Statutes, Section 824. The fee allowed in this instance is not imposed by authority of any statute of the United States dealing with costs. It is imposed by a state statute which provides that "in all cases where loss occurs * * * such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, 12 per cent. damages, together with all reasonable attorney's fees." There can be no distinction between the obligation created by this statute and that which was created by the contract before the court in the Rogers case, *supra*.

In the recent case of *Des Moines Elevator & Grain Company* v. *Underwriters' Grain Association* (C. C. A. 8th) 63 Fed. (2d) 103, suit was instituted in the state court of Iowa against one hundred and twelve insurers who had issued open policies of insurance to attorneys in fact, and the attorneys in fact had issued their certificates to the insured as evidence of coverage. The certificates were in identical language and recited that the defendants "each for itself and not one for another" insured the risk. Two of the defendants removed to the federal court on the ground of separable controversy. It was suggested that inasmuch as the statutes of Iowa permitted a single suit against all of the defendants, this would prevent a removal to the federal court. Judge Sanborn, in delivering the opinion of the court, said:

"While the liability of each of the insurers here arises out of the same undertaking, that liability is separate and distinct from the liability of any other insurer, and the happening of the contingency insured against, instead of giving rise to a single cause of action against all of the insurers, gives rise to 112 separate causes of action, which, under the Iowa statute, may be united in one action. The loss is not the cause of action, but the happening of the loss gives rise to a separate cause of action against each insurer. Had the plaintiff sued separately each of the removing defendants in the state court, as it might have done, the suits could have been removed to the federal court. The fact that, under the state statute, the plaintiff had the right to combine the causes of action in a single suit could not affect the right granted to the defendants by the laws of the United States to remove the controversy to the federal court.

"In the case of *Harrison* v. *St. L. & San Francisco R. Co.*, 232 U. S. 318, 329, 34 S. Ct. 333, 335, 58 L. Ed. 621, L. R. A. 1915F, 1187, the court said: 'In the second place, as the right given to remove by the United States law is paramount, it results that it is also of the essence of the right to remove, that when an issue of whether a prayer for removal was rightfully asked arises, a Federal question results which is determinable by the courts of the United States free from limitation or interference arising from an exertion of state power.'"

If the right to remove under the federal statute cannot be defeated by a state statute which permits one suit against numerous defendants who are severally liable just as if they were jointly liable, then a state statute cannot prevent removal where the amount in

controversy exceeds $3,000, although it labels a substantial part of the amount in controversy as "costs."

Under the decision in *Sioux County* v. *National Surety Company, supra,* suit could be maintained in the district court of the United States between citizens of different states where the plaintiff sued for $3,000 and a reasonable attorney's fee. Under this decision, the district court could render judgment for a reasonable attorney's fee, although it could not tax it as "costs." In substance, the attorney's fee allowance is part of the recovery. If the district court of the United States would have jurisdiction of a suit originally filed therein, then it follows that it would have jurisdiction of a similar case on removal.

We submit that no state statute or the interpretation thereof can change the meaning of the word "costs" as used in the act which defines the jurisdiction of the federal district courts.

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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 16.

MISSOURI STATE LIFE INSURANCE COMPANY AND HARTFORD ACCIDENT & INDEMNITY COMPANY, *Petitioners.*

v.

MARION JOHNSON, *Respondent.*

REPLY BRIEF FOR PETITIONERS.

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REPLY BRIEF.

Counsel for respondent cite several cases in their brief, involving the constitutionality of State statutes which penalize carriers for delay in the payment of claims for assessing moderate attorney's fees as costs. These cases are manifestly without application to the question which is presented here.

The case of Meeker vs. Lehigh Valley R. R. Company, 236 U. S. 412, throws no light whatever upon the question which is now before the court. In that case it seems that the Interstate Commerce Commission had made an order that the Railroad Company should pay a certain amount to Meeker & Company as reparations for unjust charges. The Railroad Company refused to comply with the order. Suit was filed in the district court to enforce the order. This court said:

> "And Sec. 16, relating to actions to enforce claims for damages after the Commission has acted thereon provides 'If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit'."

The only questions presented were whether the fee allowed was excessive and whether the provision for an attorney's fee was invalid as being arbitrary. In determining such questions, this court said:

> "It requires that the fee be reasonable and fixed by the court, and does not permit it to be taxed against the carrier until the plaintiff's demand has been adjudged upon full inquiry to be valid. In these circumstances the validity of the provision is not doubtful but certain."

Not only was there no question as to whether the attorney's fee liability should be included for jurisdictional purposes, but the statute, by its terms, postponed all liability until after an adjudication by the court.

Counsel try to escape the plain meaning of the statute which is now before the court, and at page 18 of their brief, have this to say:

> "That the fee is an incident to the litigation, and not an integral part of the cause of action, is shown by the fact that the right to the fee attaches only after the right to enforce the asserted policy liability has been adjudicated in favor of the plaintiff. The trial of a suit under Sec. 6155 presents two successive stages: (1) A determination by the jury of the plaintiff's right to enforce the claimed policy liability; and, upon the return of a verdict awarding such right, and not until then, (2) the entry by the court of a judgment awarding the attorney's fee. (See Marginal note below.)
>
> "If the jury returns a verdict for less than the amount claimed by the plaintiff, he is awarded no attorney's fee. Pac. Mut. Life Ins. Co. v. Carter, 92 Ark. 378, 123 S. W. 384. There can be no doubt that the

determination of the 'controversy' in litigation is anterior to the award of the fee; and that the award of the fee is an incident to the determination of the controversy."

There is no foundation whatever for this argument. Section 6155 Crawford & Moses' Digest of the Statutes of Arkansas plainly states that upon failing to pay within the time specified in the policy, after demand made therefor, "such company shall be liable to pay to the holder of such policy in addition to the amount of such loss, twelve per cent damages upon the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of said loss" etc. We are unable to find the basis for counsel's statement that "the right to the fee attaches only after the right to enforce the asserted policy liability has been adjudicated in favor of the plaintiff."

The statute in so many words says that liability shall attach upon failure to pay within the time fixed by the policy. Such is the construction placed upon this statute by the Supreme Court of Arkansas, in the very recent case of Missouri State Life Insurance Company vs. King, 186 Ark. 893, 57 S. W. (2d) 400. In that case the plaintiff submitted proofs of disability. The defendant asked for an opportunity to have the plaintiff examined by a physician. The plaintiff consented, but before the examination was completed he filed suit, claiming the face amount of the policy, the statutory penalty, and a reasonable attorney's fee. The physician's report having shown that the plaintiff was totally disabled, the defendant answered, admitted liability for the face amount of the policy, but contested the claim for the statutory penalty and attorney's fee. Upon appeal it was contended by the plaintiff that liability attached immediately upon receipt of proofs of disability at the home office of the defendant and that it was not even entitled to a physical examination. The court held that the plaintiff having consented to submit to an examination that liability

would not attach until after the examination was completed and the defendant has refused to pay. The following quotations are taken from the court's opinion:

> "We are not required to decide whether, in all cases or in any case, an insured is required to submit to an examination by the Company physician, the policy not having imposed that requirement. But here, whether required to do so or not, the insured had so agreed, and he appears to have been responsible for such delay as occurred in connection with his examination.
>
> "We are of the opinion, however, and do decide, that the proof of disability furnished by the insured was not conclusive of that fact. The company had the right to make an investigation. Disability is not a fact, like that of death, which either exists or does not exist. It may be, and frequently is, a question about which there is a doubt, and, if the company had the right to investigate this fact, it was, of course, entitled to a reasonable time within which to exercise the right. This investigation should be made expeditiously and in good faith, but the undisputed testimony shows both expedition and good faith."
>
> * * * * * * * * * *
>
> "The language of our statute imposing a penalty and an attorney's fee applies only when payment is refused at the time specified in the policy for the payment to be made, and our construction of the policy here sued on is that the payment was due, not upon the filing of the proof by the insured, but 'at the time of the approval by the company of the proofs as aforesaid,' filed by the insured with the company. In this connection, we repeat that this approval was due when the company, acting expeditiously and in good faith, had been afforded a reasonable opportunity to investigate the proofs submitted."

The language of the statute is plain and unambiguous, and the Supreme Court of Arkansas has said that the liability for the attorney's fee attaches at the time payment is refused as specified in the policy. Therefore we say

that counsel for respondent have ignored the plain language of the statute when they say that the fee attaches only after the right to enforce the policy liability has been adjudicated.

In a footnote at page 18 of their brief, counsel call attention to the fact that the attorney's fee was assessed at a separate hearing. Under the terms of the statute, both the attorney's fee and penalty are assessed by the court. The supplemental hearing was merely to determine what would be a reasonable attorney's fee under the circumstances. That counsel for respondent considered the liability for the attorney's fee to exist prior to the time they filed suit is evident from the allegations of the complaint and the amendment to the complaint. The allegations contained in the complaint are as follows:

> "By reason of the statutes of the State of Arkansas therein made and provided to cover cases such as this, the defendant is also liable to pay plaintiff an amount equal to 12% of the principal sum and interest owed plaintiff by way of penalty, and a reasonable attorney's fee for the prosecution and collection of the same." (R. 8.)

In the amendment to the complaint we find this allegation:

> "By reason of the statutes of the State of Arkansas therein made and provided to cover cases such as this, the defendant is also liable to pay the plaintiff a reasonable attorney's fee for his attorneys herein for the prosecution and collection of the sum due herein, which should be taxed as costs in this action." (R. 9.)

It is this liability, prior to adjudication that makes the attorney's fee a part of the amount in controversy. Costs, in the true sense, accrue during the progress of a litigated case. A liability for costs prior to the institution of a suit is inconceivable.

The auditor's fee in the case of In re Peterson, 253 U. S. 300 was an expense which was incurred during the progress of the litigation. There was no liability on the part of the unsuccessful litigant until final judgment was rendered.

Counsel cite the case of Pacific Mutual Life Insurance Company vs. Carter, 92 Ark. 378, 128 S. W. 384, in support of their contention that liability for the fee attached only after the right to enforce the asserted liability has been adjudicated in favor of the plaintiff. In that case the plaintiff had demanded and sued for $1,666.66, which was more than he was entitled to receive from the defendant. The judgment which he obtained was for less than the amount he had claimed in his complaint. The court refused to assess an attorney's fee and penalty at all, saying that to do so when the plaintiff makes an unwarranted claim would render the statute unconstitutional. If the demand was excessive the liability for the attorney's fee and penalty did not attach at all. The following quotations from the opinion leave no doubt as to the holding in this case:

> "This court has declared valid the statute allowing a penalty and attorney's fees as against fire insurance companies in Arkansas Insurance Co. v. McManus, 86 Ark. 115. The statute includes accident insurance companies, and there is no exception in favor of mutual accident insurance companies. See Acts 1905, p. 307.
>
> "But the act makes the company liable for failure to pay the loss 'after demand made therefor.' The statute thus contemplates that there shall be a demand. A recovery for penalty, and attorney's fee cannot be had when complainant makes demand for more than he is entitled to recover. It could never have been the purpose of the Legislature to make the insurance companies pay a penalty and attorney's fee for contesting a claim that they did not owe. Such an act would be unconstitutional. The companies have the right to resist the payment of a demand that they do not owe. When the plaintiff demands an excessive amount, he is in the wrong. The penalty and attorney's fee is for the benefit of the one who is only seeking to recover after

demand what is due him under the terms of his contract, and who is compelled to resort to the courts to obtain it. The appellee, by asking judgment for $1,444.44 concedes that he was demanding more in his complaint than he was entitled to receive. The judgment for the penalty and attorney's fee is therefore set aside, and the judgment of the circuit court will be affirmed for $1,444.44, with interest from date of judgment at 6 per cent."

As liability attaches upon failure to pay within the time specified in the policy, and without regard to any judicial proceeding it is, in substance, a part of the amount in controversy, and to label the item as "costs" at a later date cannot interfere with the right of removal.

A contention similar to the one which is pressed by counsel for respondent was before this court in the case of Brown vs. Webster, 156 U. S. 328. In that case there was a claim for damages on account of a breach of warranty. The measure of damages was the purchase price with interest from the date of payment. The total of the amount of the payment and the interest brought the suit within the jurisdiction of the Federal Court. It was contended that in as much as part of the claim was an item labeled "interest" it could not be considered in making up the jurisdictional amount. The court held that this was not "interest" within the meaning of the legislation which excluded that item in fixing the jurisdiction of the Federal Court.

Under the provisions of Section 6155 of Crawford & Moses' Digest of the statutes of Arkansas, the liability for the twelve per cent penalty and attorney's fee are contemporaneous. The Supreme Court of Arkansas holds that a suit involving $3,000, plus the statutory penalty is removable. In this case it held that a suit involving $3,000 plus a reasonable attorney's fee was not removable, solely because the statute which fixed the liability said that it should be taxed as costs. In substance the liabilities are the

same. If the statute had provided that the penalty should also be taxed as costs, then the Supreme Court of Arkansas would, by similar process of reasoning, say that a suit for $3,000, plus the statutory penalty of 12 per cent could not be removed to the Federal Courts. Carrying the analogy a little further, the legislature could provide that 50 per cent of all amounts recovered in the state courts should be taxed as costs, and thereby further impair the right of removal.

We respectfully submit that the right to remove to the Federal Court which is conferred by the statutes of the United States is not to be diminished by a mere label which is applied under a state statute to a part of the liability which is enforced.

Respectfully submitted,

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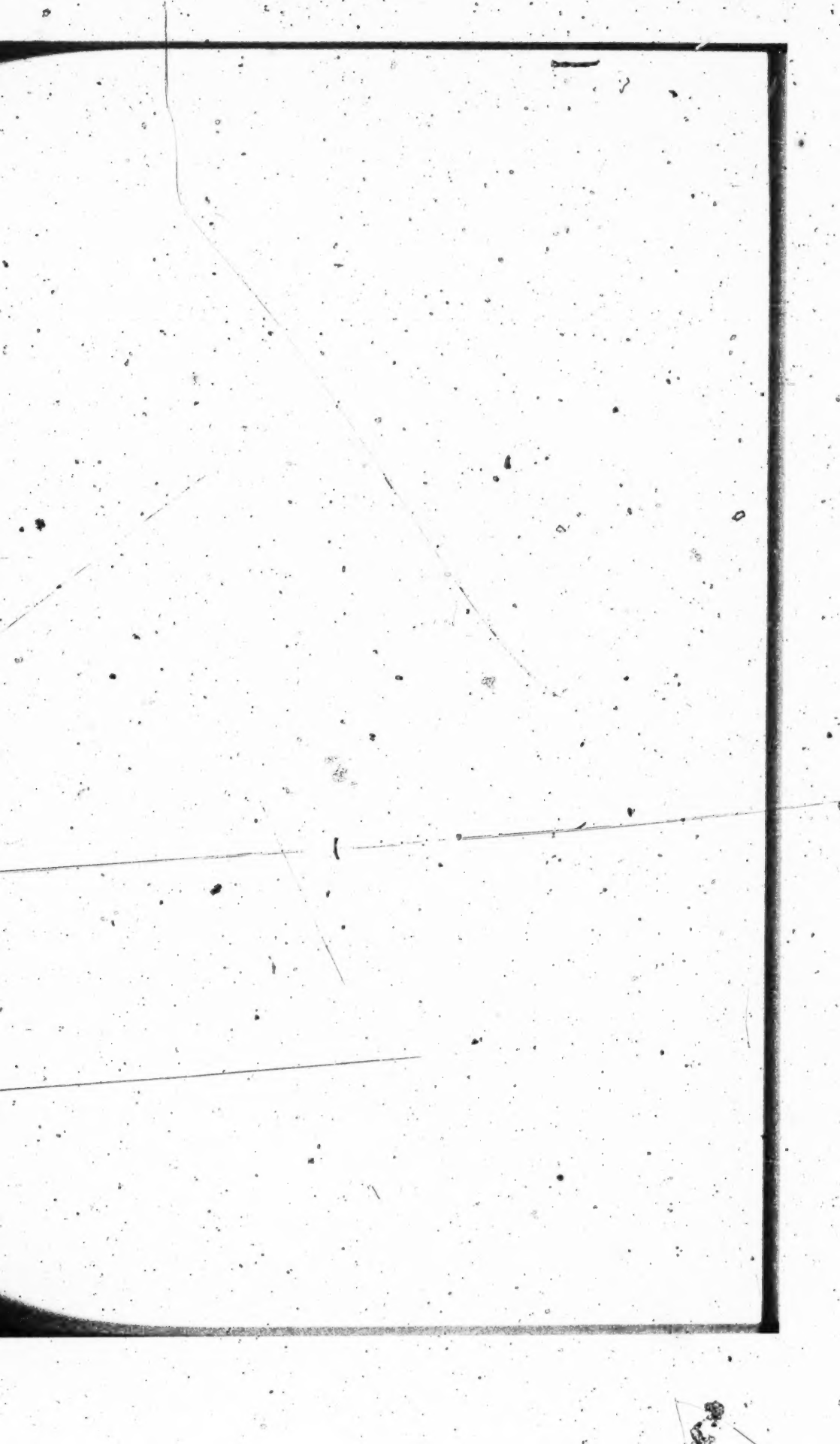


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Supreme Court of the United States

OCTOBER TERM, 1933

MISSOURI STATE LIFE INSURANCE COMPANY AND HARTFORD ACCIDENT & INDEMNITY COMPANY ..... *Petitioners,*

v. No. 16

MARION JOHNSON ..... *Respondent.*

BRIEF FOR RESPONDENT

ARGUMENT

Section 6155, C. & M. Digest of the Statutes of Arkansas, reads:

> "In all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent damages upon the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of said loss; said attorneys' fee to be taxed by the court where the same is heard on original action, by

appeal or otherwise and to be taxed as a part of the costs therein and collected as other costs are or may be by law collected." Act March 29, 1905, p. 307.

The sole question before the court on this review is as follows: In an action to recover upon an insurance policy, does a claim for attorney's fee asserted under the above statute constitute a part of the amount in controversy within the meaning of the Removal Statute, Title 28, Sec. 71, U. S. C. A.?

The claim for attorney's fee, we submit, constitutes no part of the amount in controversy.

The Removal Statute fixes the jurisdictional amount at $3,000 "exclusive of interest and costs." The attorney's fee should be treated as "costs" within the meaning of such statute.

Counsel cite, with some emphasis, the case of *People of Sioux County, Nebraska,* v. *National Surety Co.*, 276 U. S. 238, 72 L. Ed. 547. This case involved the right of the Federal Courts *to enforce* an attorney's fee provision contained in a Nebraska statute substantially identical with Sec. 6155, *supra.* It was contended that, under the Nebraska statute, the attorney's fee came in the category of "costs"; that costs, in the federal courts, are regulated only by Sections 823 and 824, Revised Statutes of the United States, and not by state statutes; therefore, that the attorney's fee provision of the Nebraska statute was not binding on the federal courts. We quote excerpts from the court's opinion:

"* * * Whether this liability for an attorney's fee, assumed by entering into an insurance contract after the enactment of the statute providing for the liability, may be enforced in the federal courts does not depend on any nice distinctions which may be taken between the right created and the remedy given. Disregarding mere matters of form, it is clear that it is the policy of the state to allow plaintiffs to recover an attorney's fee in certain cases, and it has made that policy effective by making the allowance of the fee mandatory on its courts in those cases. It would be at least anomalous if this policy could be thwarted and the right so plainly given destroyed by removal of the cause to the federal courts.

"That the statute directs the allowance, which is made to plaintiff, to be added to the judgment as costs are added does not make it costs in the ordinary sense of the traditional, arbitrary and small fees of court officers, attorneys' docket fees and the like, allowed to counsel by R. S. Secs. 823, 824.

"The present allowance, since it is not costs in the ordinary sense, is not within the field of costs legislation covered by R. S. Secs. 823, 824. That the particular mode of enforcing the right provided by the state statute, *i. e.*, by taxing the allowance as costs—is not available to the federal courts under R. S. Secs. 823, 824, does not preclude the recovery. Since the right exists the federal courts may follow their own appropriate procedure for its enforcement by including the amount of the fee in the judgment. R. S. Sec.

914 (28 U. S. C. A. Sec. 724; Comp. St. Sec. 1537). Compare *Mexican Central Ry.* v. *Pinkney,* 149 U. S. 194; *Indianapolis & St. Louis R. R.* v. *Horst,* 93 U. S. 291; *Manitowoc Malting Co.* v. *Feuchtwanger* (D. C.), 196 Fed. 506; *Boatmen's Bank* v. *Trower Bros. Co.* (C. C. A.) 181 Fed. 804."

Inasmuch as the court recognized the right and duty of the Federal Courts to enforce this attorney's fee provision, and included the amount of the fee in the judgment, opposing counsel seem to feel that the case is authority for the proposition that the claim for the fee constitutes a part of the "amount in controversy." This conclusion is unwarranted.

In this Sioux County case the court did not hold that the statutory attorney's fee was not costs; that is, costs within the meaning assigned the term under general principles of jurisprudence. It merely held that the fee was not "costs in the ordinary sense of the traditional, arbitrary and small fees * * * allowed to counsel by R. S. Secs. 823, 824." It did not hold that the fee was wholly foreign to the classification which, under general legal principles, is denominated "costs"; but it held that the fee was not "costs" within the meaning of the term as limited by Sections 823, 824. The court said: "The present allowance, since it is not costs *in the ordinary sense,* is not within the field of costs legislation covered by R. S. Secs. 823, 824." Observe that the court meticulously avoided an unqualified finding that the item was not "costs," and that instead it merely held that the item was not costs in the ordinary sense covered by R. S. Secs. 823, 824—meaning in the sense of the

traditional, arbitrary and small fees contemplated by these particular federal enactments.

In Re *Peterson,* 253 U. S. 300, 64 L. Ed. 919, the court held that the right of the Federal Courts to tax costs was not limited to the items allowable as such under the Federal Statutes. The court authorized the allowance of an auditor's fee as costs (between party and party), saying:

> "Neither the Act of Feb. 26, 1853, Chap. 80, 10 Stat. at L. 161, Rev. Stat. 983, Comp. Stat. Par. 1624, 2 Fed. Stat. Anno. 2d Ed. p. 644, nor any later act of Congress or rule of court, deals expressly or by implication with the subject of taxing as costs the expense of an auditor. The practice, if any, governing in this respect the courts of New York would, therefore, be followed in the Federal Courts."
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> * * *
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> "In *Hathaway* v. *Roach, supra,* p. 67"—2 Woodb. & M. 63, Federal Case No. 6213—"it is said to have been the usage of the federal courts 'to conform to the state laws as to costs when no express provision has been made and is in force by any act of Congress in relation to any particular item, or when no general rule of court exists on this subject.' "
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> * * *
>
> "The allowance of costs in the federal courts rests not upon express statutory enactment by Congress, but upon usage long continued and confirmed by implication from provisions in many statutes."
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> * * *

"As there is no statute, federal or state, and no rule of court excluding auditors' fees and the expense of his stenographer from the items taxable as costs, no reason appears why they may not be included, like other expenditures ordered by the court with a view to securing an intelligent consideration of a case."

In the Sioux County case, relied upon by opposing counsel, the court enforced the state statute allowing the attorney's fees; but, instead of enforcing the claim for attorney's fees as part of the amount in controversy, the Court simply exercised the right of a federal court to allow as costs items additional to those enumerated in the federal statutes; in other words, it simply exercised the right which had been previously recognized in the Peterson case. True, in the Sioux County case the attorney's fee was included in the judgment, and not "taxed" and enforced as the costs specifically authorized by R. S. 823, 824 are enforced. Presumably this procedure was adopted because under R. S. 857, Title 28, Sec. 609, U. S. C. A. (quoted in the margin below)

the federal court's right to "tax" costs, and enforce them according to the state court procedure, seems to be limited to the costs expressly mentioned in the Federal costs statutes, with the result that any unusual items of cost not mentioned in the federal statutes must be enforced (as was

NOTE: "The fees and compensations of the officers and persons hereinbefore mentioned except those which are directed to be paid out of the treasury shall be recovered in like manner as the fees of the officers of the states respectively for like services are recovered." R. S. 857, U. S. C. A., Title 28, Sec. 609.

done in the Sioux County case) by including them in the judgment as part of the judgment debt. But costs allowed and enforced by the federal courts in such unusual manner are nevertheless *true costs* if cognizable as such under the *true juridical definition of the term.*

Long prior to the Sioux County case the Supreme Court of the United States recognized these statutory attorney's fee provisions as being costs legislation—within the generally accepted meaning of "costs" as distinguished from a narrow, synthetic definition formulated with reference to some particular statute.

In *Missouri K. & T. R. Co.* v. *Harris,* 234 U. S. 412, 58 L. Ed. 1377, 1915-E L. R. A. 942, the court considered a Texas statute which awarded a successful plaintiff in certain suits against railroad companies a specified attorneys fee as part of the costs. The court said:

> "But the Texas statute now under consideration does not in anywise either enlarge or limit the responsibility of the carrier for loss of property intrusted to it in transportation, *and only incidentally affects the remedy for enforcing that responsibility. As pointed out* in the Cade case, 233 U. S. 642, 58 L. Ed. 1135, 34 Sup. Ct. Rep. 678, *it imposes not a penalty, but a compensatory allowance for the expense of employing an attorney* (our italics), applicable in cases where the carrier unreasonably delays payment of a just demand and thereby renders a suit necessary. In fact and effect, *it merely authorizes a moderate increment of the recoverable costs of suit* in the large class of cases that are within its sweep, * * *."
>
> * * *

"And we think that where a state, as in this instance, for reasons of internal policy, in order to offer a reasonable incentive to the prompt settlement of small but well-founded claims, and as a deterrent of groundless defenses, establishes by a general statute otherwise unexceptionable the policy of allowing recovery of a moderate attorneys fee *as a part of the costs,*" etc.

In *Missouri K. & T. R. Co.* v. *Cade,* 233 U. S. 642, 58 L. Ed. 1135, the court, considering the same Texas statute as that involved in the Harris case, *supra,* said:

"* * * The allowance is confined to a reasonable attorneys fee, not exceeding $20, where an attorney is actually employed; the amount to be determined by the court or jury trying the case. *Manifestly, the purpose is merely to require the defendant to reimburse the plaintiffs for a part of his expenses not otherwise recoverable as 'costs of suit.'* * * * *The outlay for an attorney's fee is a necessary consequence of the litigation, and since it must fall upon one party or the other, it is reasonable to impose it upon the party whose refusal to pay a just claim renders the litigation necessary. The allowance of ordinary costs of suit to the prevailing party rests upon the same principle.* (Our italics.) 2 Bacon Abr. title Costs."

The decision in the Cade case, last above quoted, was interpreted in the subsequent case of *Chicago & N. W. Ry. Co.* v. *Nye-Schneider-Fowler Co.,* 260 U. S. 35, 67 L. Ed. 115, as follows:

*"It was held that the attorney's fee here was manifestly only costs of suit. * * *"* (Our italics.)

In *Gulf, Colorado & Santa Fe Railroad Co.* v. *Ellis*, 165 U. S. 150, 41 L. Ed. 666, the dissenting opinion refers to an attorney's fee allowable under a Texas statute in certain suits against railroads as being *"a part of the costs of the litigation."*

The above quoted language of the Supreme Court of the United States in which statutory attorneys fees have been classified as costs of suit, referred in every case to attorney's fees allowed by a *state* statute. In the Sioux County case, the court found that such fees were not costs within the purview of R. S. 823 and 824, but when classifying these attorney's fees solely in the light of the state enactments awarding their allowance, *as interpreted with reference to general principles of jurisprudence*, it is apparent that the Supreme Court of the United States has unhesitatingly treated them as costs.

And while in the Sioux County case the court held that attorneys fees allowed under a state statute were not costs within the contemplation of R. S., 823 and 824, where confronted with a separate *federal* statute specifically awarding attorney's fees to a successful litigant, the court said:

" * * The evident purpose is to charge the carrier with the costs and expenses entailed by a failure to pay without suit,—if the claimant finally prevails,—* and to that end to tax as part of the costs in the suit wherein the recovery is had a reasonable fee for the services of the claimant's attorney in instituting and prosecuting that suit. * * *"* (Our italics.)

Meeker v. *Lehigh Valley Ry. Co.*, 236 U. S. 412, 59 L. Ed. 644.

We think that opposing counsel, in the following statement appearing at p. 17 of their brief, betray the fundamental misconception which underlies their entire argument and which has prompted the filing of their petition for a review by this court. Thus, they say:

> "If a substantial attorney's fee allowed under a state statute is not 'costs' in the ordinary sense, as the word is used in the Revised Statutes,—meaning of course, R. S. 823, 824—then why should it be called 'costs' under the removal act?"

We can see why the United States law courts, when called upon to tax and enforce costs, should regard the federal statutes as controlling conflicting state statutes; but we can not see why, on a question of removal, costs clearly classifiable as such under the state statute allowing them (as interpreted in the light of general juridical principles) should be regarded as part of the amount in controversy because of a dissimilarity between such costs and the items specifically mentioned in federal enactments. We hardly think that on a question of removal the federal court should be called upon, in any instance, to scan the list of costs allowances permitted under the state statute to ascertain whether the defendant was menaced with liability for any items of a character not authorized in Revised Statutes, 823, 824.

In the Peterson case, *supra* (253 U. S. 300; 64 L. Ed. 919) the court held that a federal law court could allow as

costs an auditors fee. This allowance was not authorized by Sections 823, 824 or any other federal statute. While this item was clearly classified and authorized to be allowed by the court as costs, yet, under counsel's theory, the item (if its allowance had been asked in a State Court complaint) would have been part of the amount in controversy and possibly a controlling factor on a motion for removal!

The decision in the Peterson case alone shows the futility of counsel's argument. In that case the court said:

> "Neither the Act of Feb. 26, 1853, Chap. 80, 10 Stat. at L. 161, Rev. Stat. 983, Comp. Stat. Par. 1624, 2 Fed. Stat. Anno. 2d Ed. p. 644, nor any later act of Congress or rule of court deals expressly or by implication with the subject of taxing as costs the expense of an auditor. *The practice, if any, governing in this respect the courts of New York would therefore be followed in the Federal Courts.*" (Our italics.)

Here is a specific finding that items of costs, wholly unauthorized by any federal statute, but finding their origin solely in the state practice, will be enforced as costs by the federal court; and yet counsel would contend that these items, though allowed and enforced by the federal judiciary as costs, would be treated on removal as "amount in controversy" because they are not catalogued in Sections 823, 824!

The Supreme Court of Arkansas, in *American Liberty Mutual Insurance Company* v. *Washington*, 183 Ark. 497, 36 S. W. (2) 963, said, in speaking of the Arkansas statute here involved:

"The statute becomes a part of the contract of insurance."

This language might be the basis of a contention that the prayer for the allowance of the attorney's fee is a prayer for the enforcement of a right awarded by contract, with the result that the claimed fee is a part of the amount in controversy. Where parties contract in reference to a subject-matter regulated by statute the statute may, in a proper case, become a part of the contract. But where the subject of such a statute is court costs, the allowances authorized thereby remain court costs, and are enforced as court costs, even in suits upon contracts in which the statute may have been impliedly incorporated. Arkansas has statutes relating to clerks and sheriffs fees, conventional items which opposing counsel would readily place in the category of costs. Every contract made in Arkansas is made with reference to these statutes; but no one would contend that in a suit on such a contract the statutory cost allowances are deemed incorporated into the contract in such a way that the authorized fees lose their identity as "costs" and become a part of *the amount in controversy.* The same would surely be true as to a statute allowing any item really and truly classifiable as costs, even though the nature of the authorized expense might vary somewhat from the general run of cost allowances.

The Supreme Court of Arkansas has somewhat loosely characterized the attorneys fee provision of Sec. 6155 as "a part of the contract of insurance" (*American Liberty Mutual Insurance Co.* v. *Washington, supra*); as "a penalty given the policyholder for expenses incurred in enforcing

the contract of indebtedness" (*Vaughan* v. *Humphreys*, 153 Ark. 140; 239 S. W. 730); as "a fee in the nature of a penalty" (*Kansas City So. Ry. Co.* v. *Marx*, 72 Ark. 357; 80 S. W. 579); as "compensation for the cost of collecting the debt" (*Mutual Life Insurance Co.* v. *Owen*, 111 Ark. 554; 164 S. W. 720).

In the analysis of Sec. 6155 required on this review, the appearance in Arkansas decisions of such terms as "penalty," "part of the contract," etc. are of little help. These are mere "tags and tickets," appellations applied by chance in controversies involving entirely different considerations from those here presented.

For that matter, the expressions used in *Vaughan* v. *Humphreys, supra,* and *Mutual Life Insurance Co.* v. *Owen,* both *supra* (*sic* "a penalty to reimburse the policyholder for expenses incurred in enforcing the contract of indebtedness" and "as compensation for the cost of collecting the debt") approach very closely the definition of "costs" contained in two standard texts (15 Corpus Juris, 19; 7 R. C. L., 780); and in concluding the definition contained in the Owen case the court states that the allowance is "taxed as costs in the case."

The use by the court of the word "penalty" is of little significance; for, even regarding this attorney's fee as an orthodox item of costs, the imposition of liability for the item (or for any other item of court costs) may well be characterized as a form of penalty, and it seems possible that the court may have used the term in this loose sense.

But, so far as the Supreme Court of Arkansas is concerned, its latest expression in the interpretation of Sec.

6155 is found in the very decision being reviewed in this proceeding; and in such decision, after a consideration of the points here involved, it held that the attorney's fee was costs and not a part of the amount in controversy. And moreover, if matters of nomenclature are important, it is significant that the statute under consideration provides that the attorney's fee is "to be taxed up as a part of the *costs*" and "collected as other costs."

In the following cases, cited by opposing counsel, the lower Federal Courts have rendered decisions upon the question of whether attorneys fees do, or do not, constitute a part of the amount in controversy within the meaning of the removal statute:

Conner v. *Connecticut Fire Ins. Co.*, 292 Fed. 767 (Dist. Ct., S. D. Fla.).

Swofford v. *Cornucopia Mines of Oregon*, 140 Fed. 957 (Circuit Court, N. D. Oregon).

Peters v. *Queen Ins. Co. of America*, 182 Fed. 113 (Circuit Court, S. D. Ga.).

Rogers v. *Riley*, 80 Fed. 759 (Circuit Court, Dist. Ky.).

In the Conner case, the court held that an attorney's fee authorized by statute was a part of the amount in controversy. The statute did not recite that the fee was allowed as "costs," as does the Arkansas statute, and the court emphasized the absence of this word, and apparently was content to rest its decision upon a mere matter of phraseology rather than upon an analysis of the real nature of the allowance.

In the Swofford case the court held that the statutory attorneys fee was costs and not a part of the amount in controversy.

In the Peters case the court treated the item as costs.

In the Rogers case the court was dealing not with a statutory attorneys fee but with one allowed under express contract, and held that it constituted a part of the amount in controversy.

Defining the term "costs", the Supreme Judicial Court of Massachusetts, in Ahmed's Case, 179 N. E. 684, said:

> *"It is an incident of litigation. So far as awarded to the successful party, costs are designed to mitigate to a greater or less extent the necessary expenses incurred in the conduct of litigation. * * * This is the nature of costs, whether founded on express statute or awarded by the courts in the exercise of their general jurisdiction."* (Our italics.)

For a similar definition, see *Hygienic Chemical Co.* v. *Provident Chemical Works*, 176 Fed. 525, (2nd C. C. A.).

The universal concept of costs, embodied in all judicial definitions of the term which we have encountered, is that costs are (1) an incident of the litigation and (2) designed to compensate a successful litigant for expense incurred in the proceeding.

Adverting to the statute under consideration, Sec. 6155, *supra*, it is obvious that the attorney's allowance there authorized must come within the foregoing definition.

That the fee is an incident to the litigation, and not an integral part of the cause of action, is shown by the fact that *the right to the fee attaches only after the right to enforce the asserted policy liability has been adjudicated in favor of the plaintiff*. The trial of a suit under Sec. 6155 presents two successive stages: (1) A determination by the jury of the plaintiff's right to enforce the claimed policy liability; and, upon the return of a verdict awarding such right, and not until then, (2) the entry by the court of a judgment awarding the attorney's fee. (See Marginal note below.)

If the jury returns a verdict for less than the amount claimed by the plaintiff, he is awarded no attorney's fee. *Pac. Mut. Life Ins. Co.* v. *Carter,* 92 Ark. 378, 123 S. W. 384. There can be no doubt that the determination of the "controversy" in litigation is anterior to the award of the fee; and that the award of the fee is an incident to the determination of the controversy.

That the fee is designed to compensate a successful litigant; for expense incurred in the prosecution of his claim is self-evident, and was recognized by the Supreme Court of Arkansas in *Vaughan* v. *Humphreys and Mutual Life Insurance Co.* v. *Owen,* both *supra.*

If the attorney's fee authorized under Sec. 6155 is costs within the meaning of the universal and accepted definitions of the term, it is costs within the meaning of the re-

NOTE: Thus note that in the trial of the case on review, the claim for attorney's fees was determined in a second hearing, entirely separate from the hearing on the merits of plaintiff's claim. (R. 24-35.)

moval statute. Counsel's contention that items recognized as costs under the removal statute must find their counterpart in R. S. 823, 824 is utterly untenable.

Mere allegations of liability or damage in a sum equal to the jurisdictional amount are not alone sufficient to justify a finding, on a removal proceeding, that the cause presents the jurisdictional amount in controversy. Before such a finding is made, the court must analyze the plaintiff's allegations in the light of the law which will control the trial of the cause and determine whether such allegations state a cause of action in the jurisdictional amount. *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 468; 42 L. Ed. 1111. As above stated, this analysis must be made with reference to the law (state or federal) which is to be applied in the adjudication of the controversy. In view of this, it cannot be said that the amount in controversy is computed exclusively with reference to the federal law, or with reference to the state law, but such amount is computed with reference to the law which will be applied in the determination of the controversy. It would seem to follow, therefore, that to such extent as statutory allowances of questionable classification are sought by the plaintiff, these allowances, for the purposes of computing the amount in controversy, should be classified in the light of the state statute authorizing them as interpreted with reference to general legal principles applicable thereto. Federal courts enforce, and enforce *as costs*, allowances which are utterly foreign to R. S. 823, 824 (Peterson case, *supra*, 253 U. S. 300; 64 L. Ed. 919); and the proposition that on removal the court should treat as costs only those fees and allow-

ances which find their duplicate in R. S. 823, 824, points to a procedure which would be utterly strained and illogical.

The decision in *Missouri, K. & T. R. Co.* v. *Harris, supra,* (234 U. S. 412, 58 L. Ed. 1377), should be controlling on this review. That case involved a Texas statute authorizing the allowance of an attorney's fee in favor of successful plaintiffs in certain suits against railroad companies. For the purpose here under consideration, the statute was the same as Sec. 6155. It was there contended that the statute represented an attempt by the state to burden interstate commerce. Under this contention, it became important to determine whether the statute operated to enlarge the responsibility of the railroad as an interstate carrier, or whether it merely authorized an allowance which was an incident to the court procedure of the forum.

The court said:

> "But the Texas statute now under consideration *does not in anywise either enlarge or limit the responsibility of the carrier* for the loss of property intrusted to it in transportation. * * * In fact and effect, it merely authorizes a *moderate increment of the recoverable costs of suit in the large class of cases that are within its sweep.*
>
> "In claims of this character, based upon the ordinary liability of the common carrier, although regulated by the commerce act, the state courts have full jurisdiction, and some differences respecting the allowance of costs, and the amount of the costs are inevitable, as being peculiar to the forum. * * *

"The local statute, as already pointed out, does not at all affect the ground of recovery, or the measure of recovery; it deals only with a question of costs, respecting which Congress has not spoken. Until Congress does speak, the state may enforce it in such a case as the present."

If the Texas railroad statute, in allowing the attorney's fee did "*not in anywise either enlarge or limit the responsibility of the carrier*" and did not "*affect the ground of recovery,*" but merely represented a matter of costs legislation, by analogy we can surely venture that the Arkansas statute does not in anywise "*enlarge or limit the responsibility*" of the insurance company and does not "*affect the ground of recovery.*" This being the case, obviously the Arkansas statute, like the Texas enactment, is cost legislation.

CONCLUSION

For such reasons, it is, therefore, insisted that the judgment of the Supreme Court of Arkansas should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 16.—October Term, 1933.

Missouri State Life Insurance Company and Hartford Accident & Indemnity Company, Petitioners,
vs.
Jester Jones, Administrator of the Estate of Marion Johnson, deceased.

On Writ of Certiorari to the Supreme Court of the State of Arkansas.

[December 4, 1933.]

Mr. Justice McReynolds delivered the opinion of the Court.

In a removal proceeding based upon diversity of citizenship, is it proper to treat attorneys' fees imposed by the Arkansas statute and claimed by the plaintiff, as part of the sum necessary for jurisdiction in the Federal court?

Sec. 41, U. S. C. A. (Jud. Code, Sec. 24) confers original jurisdiction upon District Courts of the United States of suits of a civil nature between citizens of different States "where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000." And Sec. 71, U. S. C. A. (Jud. Code, Sec. 28) provides for removing suits of which District Courts are given original jurisdiction.

Sec. 6155, Crawford & Moses' Digest, Statutes of Arkansas—

> "In all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor, shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent damages upon the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of said loss; said attorneys' fees to be taxed by the court where the same is heard on original action, by appeal or otherwise and to be taxed up as a part of the costs therein and collected as other costs are or may be by law collected. Act March 29, 1905, p. 307."

Seeking to recover upon two insurance policies, respondent Johnson, a citizen of Arkansas, sued the petitioner, a Missouri corporation, in the Hot Springs Circuit Court. He asked judgment for $3,000, total of the policies, "together with a reasonable attorney's fee for his attorneys herein and for all of his costs herein expended."

By proper proceeding the defendant company asked removal of the cause to the United States District Court. It alleged a reasonable attorney's fee would amount to $250.00 and that the matter in controversy exceeded $3,000, exclusive of interest and costs. Removal was denied. Judgment went in favor of Johnson for $3,000; also the court further found and adjudged "that the plaintiff is entitled to an attorney's fee of $550, and the same is hereby assessed and taxed as a part of the costs in this case." Upon appeal the Supreme Court affirmed the judgment. Among other things, it said—

> "Appellant contends for a reversal of the judgment upon the ground that the trial court erred in denying its petition for removal of the cause to the Federal Court. It is argued that to include an attorney's fee in the amount sued for exceeds $3,000, interest and costs and in amount makes the cause a removable one under the Federal Removal Statute. This court has ruled otherwise in the case of *Mutual Life Ins. Co.* v. *March*, 185 Ark. 332 [333]. In the case referred to, it was ruled that an attorney's fee in cases of this nature must be taxed as costs in compliance with the express terms of section 6135 of Crawford & Moses' Digest."

In March's Case, judgment was sought upon an insurance policy for $3,000, together with 12% penalty and attorneys' fees. The trial court denied a petition for removal. The Supreme Court, disapproved and said—"He sues for $3,000 and 12 per cent. damages and attorney's fees. Section 6155, *supra*, provides that the attorney's fees shall be taxed as costs, but it does not provide that the 12 per cent. penalty shall be taxed as costs. Therefore the amount in controversy was $3,360." Evidently, the Court concluded because the State statute directed that attorneys' fees should be treated as costs, they were costs within the removal statute. Also, that the prescribed damages were not costs since not so declared.

But this view was rejected here in *Sioux County* v. *National Surety Co.*, 276 U. S. 238, 241. We there held that a statute which allowed attorneys' fees to be taxed as part of the costs created a liability enforceable by proper judgment in a Federal court; that the mere declaration of the State statute could not alter the true nature of the obligation.

In the State court the present respondent sought to enforce the liability imposed by statute for his benefit—to collect something to which the law gave him a right. The amount so demanded became part of the matter put in controversy by the complaint, and not mere "costs" excluded from the reckoning by the jurisdictional and removal statutes.

The challenged judgment must be reversed.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.